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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~301~~. 56.

JOHN W. IRWIN, PLAINTIFF IN ERROR,

VS.

GEORGE P. WILLIAR AND HENRY D. WILLIAR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED OCTOBER 4, ~~[illegible]~~ 1880.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and seventy-nine, before the honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana, and ex-officio judge of said circuit court.

GEORGE P. WILLIAR AND HENRY D. WILLIAR
v. 6276. Civil action.
JOHN W. IRWIN AND GEORGE M. DAVIS.

Be it remembered that heretofore, to wit, on the 6th day of November, A. D. 1878, at the November term of said court, before the honorable Walter Q. Gresham, judge as aforesaid, a transcript was filed in the above-entitled cause, in the words following, to wit:

THE STATE OF INDIANA,
Thirteenth Judicial Circuit, County of Clay, ss:

Clay circuit court, regular session and October term, A. D. 1877, at the court-house of said county.

On Monday, the 15th day of October, A. D. 1877, it being the seventh judicial day of said term, the following proceedings were had before the Hon. Solon Turman, judge of said circuit, viz:

2 GEORGE P. WILLIAR, HENRY D. WILLIAR,
v. 4397. Civil.
JOHN W. IRWIN, GEORGE M. DAVIS.

Come now the pl'ffs hereto, by counsel, and on their motion, this cause is docketed, and complaint filed as follows: * * * * And day is given.

Ordered that court now adjourn until 8½ o'clock to-morrow morning.
Record read and signed in open court this 16' day of October, A. D. 1877.

SOLON TURMAN,
Judge 13th Judicial Circuit, Indiana.

THE STATE OF INDIANA,
County of Clay, ss:

Thirteenth judicial circuit, Clay circuit court, regular session and October term, A. D. 1877, at the court-house of said county.

On Thursday, the 8th day of November, A. D. 1877, it being the twenty-eighth judicial day of said term, the following proceedings are had before the honorable Solon Turman, judge of said circuit, viz:

GEORGE P. WILLIAR ET AL.
v. 4397. Civil.
JOHN W. IRWIN ET AL.

Cause continued for process, with leave to pl'ff to make new parties defendant.

3 Ordered that court now adjourn until 8½ oclock to-morrow morning.

Record read and signed in open court this 9th day of November, A. D. 1877.

SOLON TURMAN,
Judge 13th Judicial Circuit, Indiana.

STATE OF INDIANA,
County of Clay, ss:

Thirteenth judicial circuit, Clay circuit court, regular session and January term, A. D. 1878, at the court-house of said county.

On Monday, the 7th day of January, A. D. 1878, it being the first judicial day of said term, the following proceedings are had before the honorable Solon Turman, judge of said circuit, viz:

Present, Hon. Solon Turman, judge; Tarvin C. Grooms, pros. att'y; Elias C. Kilmer, clerk; Alexander Haggart, sheriff.

GEORGE P. WILLIAR, HENRY D. WILLIAR
v.
JOHN W. IRWIN AND GEORGE M. DAVIS. } 4397. Civil.

Come now the pl'ff's by counsel and file their amended complaint as follows: * * * And on motion this cause is continued for process.

Ordered that court now adjourn until to-morrow morning at 8½ o'clock.

Record read and signed in open court this 8th day of January, A. D. 1878.

SOLON TURMAN,
Judge 13th Judicial Circuit, Indiana.

4 THE STATE OF INDIANA,
County of Clay, ss:

Thirteenth judicial circuit, Clay circuit court, regular session and March term, A. D. 1878, at the court-house of said county.

On Monday, the 25th day of March, A. D. 1878, it being the seventh judicial day of said term, the following proceedings are had before the honorable Solon Turman, judge of said circuit, viz:

GEORGE P. WILLIAR ET AL.
v.
JOHN W. IRWIN ET AL. } 4397. Civil.

Come now defendants hereto, by counsel, and file their answer and interrogatories herein as follows: * * * * * * *

And pl'ffs are ruled to reply and to answer interrogatories, and day is given.

Ordered that court adjourn until 8½ o'clock to-morrow morning.

Record read and signed in open court this 26th day of March, A. D. 1878.

SOLON TURMAN,
Judge 13th Judicial Circuit, Indiana.

THE STATE OF INDIANA,
County of Clay:

Thirteenth judicial circuit, Clay circuit court, regular session and March term, A. D. 1878, at the court-house of said county.

On Wednesday, the 26th day of March, A. D. 1878, it being the eighth judicial day of said term, the following proceedings are had before
5 the honorable Solon Turman, judge of said circuit, viz:

GEORGE P. WILLIAR ET AL.
v. } 4397. Civil.
JOHN W. IRWIN ET AL.

Come now the pl'ffs hereto, by counsel, and file their demurrer to the 3d, 4th, 5th, 6th, and 7th paragraphs of answer and cross-bill herein, and their motion to strike out interrogatories as follows:

* * * * * * *

And now, by agreement of parties, this cause is continued generally.

Ordered that court now adjourn until 8½ o'clock to-morrow morning.

Record read and signed in open court this 27th day of March, A. D. 1878.

SOLON TURMAN,
Judge 13th Judicial Circuit, Indiana.

STATE OF INDIANA,
County of Clay, ss:

Thirteenth judicial circuit, Clay circuit court. Regular session and May term, A. D. 1878, at the court-house of said county.

On Friday, the 31st day of May, A. D. 1878, it being the fifth judicial day of said term, the following proceedings are had before the honorable Solon Turman, judge of said circuit, viz:

GEORGE P. WILLIAR ET AL.
v. } 4397. Civil.
JOHN W. IRWIN ET AL.

6 Come now the parties hereto, by counsel, and, on motion, this cause is continued generally.

Ordered that court now adjourn until 8½ o'clock to-morrow morning.

Record read and signed in open court this 1st day of June, A. D. 1878.

SOLON TURMAN,
Judge 13th Judicial Circuit, Indiana.

THE STATE OF INDIANA,
County of Clay, ss:

Thirteenth judicial circuit, Clay circuit court. Regular session and October term, A. D. 1878, at the court-house of said county.

On Thursday, the 19th day of October, A. D. 1878, it being the tenth judicial day of said term, the following proceedings are had before the honorable Solon Turman, judge of said circuit, viz:

GEORGE P. WILLIAR ET AL.
v. } 4397. Civil.
JOHN W. IRWIN ET AL.

Comes now John W. Irwin, by his counsel, and files his separate answer herein, as follows:

* * * * * * *

And pl'ffs file their demurrer to 2d paragraph of said def't's answer.

* * * * * * *

And day is given.

Ordered that court now adjourn until 8½ o'clock to-morrow morning.

Record read and signed in open court this 18th day of October, A. D. 1878.

SOLON TURMAN,
Judge 13th Judicial Circuit, Indiana.

7 The State of Indiana,
County of Clay:

Thirteenth judicial circuit, Clay circuit court. Regular session and October term, A. D. 1878, at the court-house of said county.

On Saturday, the 19th day of October, A. D. 1878, it being the twelfth judicial day of said term, the following proceedings are had before the honorable Solon Turman, judge of said circuit, viz:

George P. Williar et al.
v. } 4397. Civil.
John W. Irwin et al.

Come now the parties hereto, by counsel, and the court, being fully advised in the premises, overrules the several demurrers herein, to which ruling pl'ffs except. And pl'ffs are ruled to reply, and day is given.

Ordered that court now adjourn until 9 o'clock next Monday morning.

Record read and signed in open court this 21st day of October, A. D. 1878.

SOLON TURMAN,
Judge 13th Judicial Circuit, Indiana.

The State of Indiana,
County of Clay, ss:

Thirteenth judicial circuit, Clay circuit court. Regular session and October term, A. D. 1878, at the court-house of said county.

On Tuesday, the 22d day of October, A. D. 1878, it being the fourteenth
judicial day of said term, the following proceedings are had before
8 the honorable Solon Turman, judge of said circuit, viz:

George P. Williar et al.
v. } 4397. Civil.
John W. Irwin et al.

Come now def'ts hereto, by counsel, and file their motion to suppress depositions herein as follows: * * * And day is given.

Ordered that court now adjourn until 8½ o'clock to-morrow morning.

Record read and signed in open court this 23d day of October, A. D. 1878.

SOLON TURMAN,
Judge 13th Judicial Circuit, Indiana.

THE STATE OF INDIANA,
County of Clay, ss:

Thirteenth judicial circuit, Clay circuit court. Regular session and October term, A. D. 1878, at the court-house of said county.

On Thursday, the 24th day of October, A. D. 1878, it being the sixteenth judicial day of said term, the following proceedings are had before the honorable Solon Turman, judge of said circuit, viz:

GEORGE P. WILLIAR, HENRY D. WILLIAR,
v.
JOHN W. IRWIN, ISAAC M. COMPTON, ADM'R of George M. Davis.
4397. Civil.

9 Come now the pl'ffs hereto, by counsel, and file their petition and a bond with surety as required by law herein, praying the court to transfer this cause to the circuit court of the United States for the district of Indiana, at Indianapolis, Indiana, and certify the same to said court, as follows:

To the honorable the judge of the Clay circuit court:

Your petitioners, George P. Williar and Henry D. Williar, partners by the style of George P. Williar & Son, plaintiffs in the above-entitled action, would respectfully represent:

That your petitioners and each of them are and were at the commencement of this action citizens of the State of Maryland, and have been citizens of the State of Maryland from the commencement of this action to the present time.

That at the commencement of this action the defendant John W. Irwin was a citizen of the State of Pennsylvania, and ever since that time has been and still is a citizen of said State.

That the defendant Isaac M. Compton, administrator of the estate of George M. Davis, deceased, at the commencement of this action was a citizen of the State of Indiana, and has ever since that time been and still is a citizen of said State, and that he has letters of administration upon said estate that were issued to him by this court.

10 That the matters in controversy in this action are exclusively between the parties plaintiff and defendant aforesaid, citizens of different States as aforesaid.

That the amount in dispute herein, exclusive of costs, exceeds the sum or value of five hundred dollars ($500).

That the cause aforesaid is not yet at issue and that this is the first term at which this cause could be tried.

That your petitioners have made and now file herewith their bond, with John H. Ohr as surety, conditioned that your petitioners will enter their appearance in the circuit court of the United States for the district of Indiana, to be held at the city of Indianapolis, on the first day of the November term, 1878, and file a copy of the record of this suit in that court, and will pay all costs that may be awarded by said circuit court of the United States if said court shall hold this suit to have been wrongfully or improperly removed thereto.

Wherefore your petitioners pray your honor to grant an order herein removing this cause for trial to the circuit court of the United States for the district of Indiana, at the city of Indianapolis.

GEO. P. WILLIAR AND SON.

STATE OF INDIANA,
County of Clay, ss:

Henry D. Williar, one of the plaintiffs in the above-entitled cause, being duly sworn, on his oath says that the foregoing petition and 11 application and the facts stated therein are true, as he verily believes, and that he makes this affidavit for and on behalf of the plaintiffs in said cause.

HENRY D. WILLIAR.

Subscribed and sworn to before me this October 24th, 1878.

E. C. KILMER,
Clerk Clay Circuit Court, Indiana.

12 STATE OF INDIANA,
Clay County, ss:

In the Clay circuit court, October term, 1878.

GEORGE P. WILLIAR AND HENRY D. WILLIAR, partners by the style of Geo. P. Williar & Son,
v.
JOHN W. IRWIN AND ISAAC W. COMPTON, administrator of the estate of George M. Davis, deceased.
} No.

Bond filed by plaintiffs with petition for removal of the above-entitled cause to the circuit court of the United States for the district of Indiana.

Know all men by these presents that we, George P. Williar and Henry D. Williar, partners by the style of Geo. P. Williar & Son, as principals, and John H. Ohr, as surety, are held and firmly bound unto John W. Irwin and Isaac M. Compton, administrator of the estate of George M. Davis, deceased, defendants herein, in the sum of five hundred dollars.

The condition of this obligation is such that if the said George P. Williar and Henry D. Williar, partners by the style of George P. Williar & Son, plaintiffs herein, shall enter their appearance in the circuit court of the United States for the district of Indiana, to be held at the 13 city of Indianapolis, on the first day of the November term, 1878, and shall file in said United States circuit court a copy of the record of this suit in this court, and shall pay all costs that may be awarded by said circuit court of the United States if said court shall hold this suit to have been wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall be and remain in full force and virtue.

Witness our hands this 23d day of October, eighteen hundred and seventy-eight.

GEO. P. WILLIAR & SON.
JOHN H. OHR.

Attest:
OSCAR B. HORD.

STATE OF INDIANA,
County of Marion, ss:

I, Austin H. Brown, clerk of Marion circuit court, do hereby certify that John H. Ohr, whose name is above written, is well known to me, and that in my opinion he is pecuniarily responsible for any sum not exceeding ten thousand dollars ($10,000).

Witness my hand and seal of said court, at Indianapolis, this 23d day of October, A. D. 1878.

[SEAL.]

AUSTIN H. BROWN,
Clerk M. C. C.

And day is given.

Ordered that court now adjourn until 8½ o'clock to-morrow morning.

Record read and signed in open court this 25th day of October, A. D. 1878.

14

SOLON TURMAN,
Judge 13th Judicial Circuit, Indiana.

THE STATE OF INDIANA,
County of Clay, ss:

Thirteenth judicial circuit, Clay circuit court, regular session and October, A. D. 1878, at the court-house of said county.

On Monday, the 28th day of October, A. D. 1878, it being the nineteenth judicial day of said term, the following proceedings are had before the honorable Solon Turman, judge of said circuit, viz:

GEORGE P. WILLIAR, HENRY D. WILLIAR
v.
JOHN W. IRWIN, ISAAC M. COMPTON, ADM'R OF George M. Davis.
} 4397. Civil.

Come now the parties hereto, by counsel, and the court, being fully advised in the premises, sustains the petition herein to transfer this cause to the Federal court.

It is therefore ordered by the court that this cause be transferred to the United States circuit court for the district of Indiana, and that the clerk of this court make out and transmit to the clerk of said Federal court a transcript of the proceedings had in this court, together with the files in said cause.

Ordered that court now adjourn until 8½ o'clock to-morrow morning.

15 Record read and signed in open court this 29th day of October, A. D. 1878.

SOLON TURMAN,
Judge of 13th Judicial Circuit, Indiana.

STATE OF INDIANA,
Clay County, ss:

I, Elias C. Kilmer, clerk of the Clay circuit court, of the county of Clay, in the State of Indiana, do hereby certify that the foregoing is a true and complete copy of the proceedings of said court in the above-entitled cause, on the days and years first aforesaid, as appears on record in my office.

In testimony whereof I hereunto subscribe my name and hereto affix the seal of the said Clay circuit court, at my office, at Brazil, this 30th day of October, A. D. 1878.

[SEAL.]

E. C. KILMER,
Clerk of Clay Circuit Court.

16 And afterwards, to wit, on the 7th day of November, A. D. 1878, at the November term of said court, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

And now here come the plaintiffs by Baker, Hord and Hendricks, their attorneys, and the defendants come by McDonald and Butler, their attorneys, and file their agreement in writing to the effect that the partial transcript of the record in this cause in the Clay circuit court, and the original pleadings and papers in the cause filed in the Clay circuit court and sent to this court with said transcript and now on file in this court, shall be substituted for a complete transcript of the record of the cause in said Clay circuit court.

It is therefore ordered that the said partial transcript of said record and the said original papers and pleadings filed in the Clay circuit court be, and they are hereby, substituted for a complete copy or transcript of the record in said cause, and the cause shall progress as if a complete transcript of said record in said Clay circuit court had been filed in this court on the first day of the present term.

And said agreement is in the words following, to wit:

Whereas, on the application of the plaintiffs in the above-entitled cause,
the Clay circuit court, on the 28th day of October, 1878, ordered
17 said cause to be transferred to the United States circuit court for
the district of Indiana, and as a part of said order of transfer directed that the clerk of said Clay circuit court should make and transmit to the clerk of said Federal court a transcript of the proceedings had in said Clay circuit court, together with the files in said cause; and, in compliance with said order, the clerk, instead of sending up a complete transcript of the record, including the pleadings, &c., has forwarded a partial transcript, setting forth the docket entries and orders made by the Clay circuit court in the cause, and with said transcript has also forwarded to the clerk of said U. S. circuit court the original files in the cause, including all the papers and pleadings filed in said Clay circuit court.

Now, to prevent the trouble and expense of obtaining a rule on the said clerk of said Clay circuit court (and the trouble and expense of complying with such rule) to certify a complete copy of the record in said cause, it is hereby agreed by and between the parties to said cause that the partial transcript and the original papers in the cause forwarded by the clerk of the Clay circuit court to the clerk of the United States circuit court shall be treated as and substituted for a complete transcript of the entire record in the cause.

But nothing in this agreement shall be taken as waiving on the part of the defendants any objection to the regularity of the transfer

18 in any other respect, but the defendants may move to remand the cause to the Clay circuit court in like manner and with like effect as they could have done if a complete transcript of the record had been certified and forwarded by the clerk of the Clay circuit court to the clerk of the United States circuit court

BAKER, HORD AND HENDRICKS,
Att'ys for Plaintiffs.
McDONALD AND BUTLER,
Att'ys for Def'ts.

And afterwards, to wit, at the November term of said court, on the 30th day of November, 1878, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

And now here it appearing to the court that this action, founded on contract, was commenced in the Clay circuit court against the said John W. Irwin, as surviving partner of George W. Davis, deceased, and against said Isaac N. Compton, as administrator of the said George W. Davis, deceased, it being allowed by the State practice thus to join the surviving partner and the administrator of the deceased partner in the same action, and it being necessary in this court that the claim sued on as far as it relates to the surviving partner should be prosecuted as an action at law,
and so far as it relates to the administrator of the deceased partner
19 should be prosecuted as a suit in chancery, wherefore it is ordered that this cause as now docketed shall be prosecuted as an action at law against the surviving partner, and that the plaintiffs have leave to file a bill in chancery for the same causes of action against the said administrator of said deceased partners.

20 And afterwards, to wit, at the November term of said court, on the 18th day of April, 1879, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause was had, to wit:

Come now the plaintiffs, by Messrs. Baker, Hord and Hendricks, their attorneys, and by leave of court file their declaration against defendant John Irwin herein in the words following, to wit:

21 First. George P. Williar and Henry D. Williar, partners under the firm-name of George P. Williar and Son, citizens of the State of Maryland, plaintiffs, complain of John W. Irwin, a citizen of the State of Pennsylvania, defendant, and say:

That from a time prior to the 12th day of July, 1877, continuously until the time of the bringing of this suit the said plaintiffs, as such partners, have been engaged as flour and grain commission merchants in the city of Baltimore, in said State of Maryland, and as such have carried on the business of buying and selling flour and grain on commission for their customers and correspondents.

That on and before said 12th day of July, 1877, said defendant and one George M. Davis, now deceased, were partners under the firm-name of Irwin and Davis, doing business at the city of Brazil, Indiana, and engaged in the business, among other things, of buying and selling grain; and that they continued to carry on such business as such partners until, to wit, the 24th day of October, 1877, when said George M. Davis died.

The plaintiffs say that the said Irwin and Davis, on the 17th day of July, 1877, being or pretending to be possessed of 10,000 bushels of No. 2 red winter wheat, or in expectancy of possessing the same, did order and direct the plaintiffs, as such commission merchants, to sell for
22 them at said city of Baltimore 5,000 bushels of said wheat at the rate of above $1.40 per bushel, deliverable by them during all the month of September, 1877, or 10,000 bushels at the rate of above $1.42 per bushel deliverable as aforesaid.

That it was and is the general usage, of long standing and well known and understood in all the large grain markets of the country, and especially in said city of Baltimore, for grain commission merchants so making sales for future delivery for and upon the order and direction of their employers to make and contract such sales in their own names, thereby becoming personally responsible for the performance thereof to the purchaser, which general usage and custom was then there well known to said Irwin and Davis.

That pursuant to said order and direction of said Irwin and Davis said plaintiffs did, on said day at said city of Baltimore, in the usual mode and course of business at said city, contract in their own names with a good and responsible purchaser in the market for the sale of said 10,000 bushels deliverable at said city of Baltimore at the seller's option during all said month of September, at and for the price of one dollar and forty-two cents per bushel, to be paid by the purchaser on delivery, amounting in all to the sum of 14,200 dollars.

Plaintiffs say that said sale was made at the highest and best
23 price and on the most favorable terms for said Irwin and Davis that it was practicable to obtain in said market, and that the same was promptly reported to and ratified by them.

Said plaintiffs aver that afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, said Irwin and Davis undertook and faithfully promised the plaintiffs that they would within a reasonable time thereafter, and in sufficient time to enable the plaintiffs to comply with their said contract as such commission merchants to deliver said 10,000 bushels of No. 2 red winter wheat to the purchasers thereof, ship, consign, and deliver the same for that purpose to the plaintiffs at said city of Baltimore.

And, further, that they would pay to the plaintiffs their reasonable commissions as compensation for their services in that behalf.

Plaintiffs aver that said Irwin and Davis, disregarding their said promise and undertaking, wholly failed to ship, consign, or deliver said wheat or any portion thereof to them for the purpose aforesaid; but, on the contrary thereof, did afterwards, to wit, on the 17th day of September, 1877, order and direct the plaintiffs to close the said contract and perform the same by purchasing a like amount of like wheat in said Baltimore market, and filling said contract by delivering the same to said purchaser, instead of wheat to be consigned for that purpose by them, said Irwin and
24 Davis, and did direct the plaintiffs to use their best judgment in the premises.

And plaintiffs say that thereupon, using their best judgment, they, as such commission merchants, *they* did afterwards, to wit, on the 18th day of said month of September, purchase in said market 10,000 bushels of No. 2

red winter wheat, at and for the price of one dollar and forty-two and one-half (1.42½) cents per bushel, amounting in all to the sum of 14,250 dollars, that being the market value of such wheat at the time of purchase, and the lowest price at which the plaintiffs could, by reasonable diligence, then there purchase the same, which sum they then there paid and satisfied to their seller, out of their own moneys and means, and did use and apply said wheat in performing, satisfying, and settling their aforesaid contract of sale made by the order and direction of said Irwin and Davis.

And they aver that the sum so paid by them at the instance and for the use of said Irwin and Davis exceeded the amount received by them upon their said sale of said wheat by the sum of fifty dollars, and that their reasonable commissions for their services in the premises was one hundred dollars, all of which remains wholly unpaid.

Wherefore they pray judgment against said defendant as surviving partner for three hundred dollars.

Second. And plaintiffs, further complaining of said defendant,
25 say that from a time prior to the 14th day of August, 1877, continuously said plaintiffs as partners under the firm-name of George P. Williar & Son have been engaged in business as flour and grain commission merchants in the city of Baltimore and State of Maryland, and as such have carried on the business of buying and selling flour and grain on commission for their customers and correspondents.

That on and before said 14th day of August, 1877, said defendant and one George M. Davis, now deceased, were partners under the firm-name of Irwin and Davis, doing business in the city of Brazil, Indiana, and engaged in the business, among other things, of buying and selling grain, and that they continued to carry on such business as such partners until, to wit, the 24th day of October, 1877, when said George M. Davis died.

The plaintiffs say that said Irwin and Davis, on said 14th day of August, 1877, being or pretending to be possessed of 10,000 bushels of No. 2 red winter wheat, or in expectancy of possessing the same, did order and direct the plaintiffs, as such commission merchants, to sell for them at said city of Baltimore said ten thousand bushels, at the rate of above one dollar and thirty-two (1.32) cents per bushel, deliverable at any time during the month of September, 1877, at the option of said Irwin and Davis.

That it was and is the general usage of long standing, and well known
and understood in all the large grain markets of the country, and
26 especially in said city of Baltimore, for grain commission merchants
so making sales or purchases for future delivery for and upon the order and direction of their employers to make and contract the same in their own names, thereby becoming personally responsible for the performance thereof to the persons with whom they so contract, which general usage and custom was then there well known to said Irwin and Davis.

That being unable to sell all of said 10,000 bushels of wheat on terms within either the letter or the spirit of said order, they did, as the nearest practicable approximation thereto, in the usual course and mode of business at said city of Baltimore, contract in their own names with a good and responsible purchaser in the market for the sale of five thousand bushels of such wheat, deliverable at said city during all said month of September, at the seller's option, at and for the price of one hundred and thirty-two cents per bushel, amounting in all to the sum of 6,600 dollars, to be paid by the purchaser upon delivery.

That plaintiffs promptly notified said Irwin and Davis of said sale and the terms thereof, and that the same was by them, said Irwin and Davis, approved and ratified.

Plaintiffs further say that afterwards, to wit, on the 16th day of Au-
27 gust, 1877, said Irwin and Davis, being or pretending to be possessed
of other 10,000 bushels of No. 2 red winter wheat, or in expectancy of possessing the same, did order and direct the plaintiffs, as such commission merchants, to sell for them at said city of Baltimore said ten thousand bushels of wheat, deliverable either in the month of September or the month of October, at their option as to the time in the month, at the rate of above one dollar and thirty cents per bushel.

That pursuant to said last-named order and direction said plaintiffs did, at said city of Baltimore, in the usual mode and course of business at said city, contract in their own names with a good and responsible purchaser in the market for the sale of said ten thousand bushels of wheat, deliverable at said city at any time at the seller's option during the month of September, 1877, at and for the price of one dollar and thirty-three and three-fourths cents per bushel, amounting in all to the sum of 13,075.80 dollars, to be paid on delivery.

And plaintiffs further say that afterwards, to wit, on the 17th day of August, 1877, said Irwin and Davis, being or pretending to be possessed or in expectancy of possessing other thirty thousand bushels of No. 2 red winter wheat, did order and direct the plaintiffs, as such commission merchants, to sell for them at said city of Baltimore said thirty thousand bushels of wheat, at one dollar and twenty-nine and one-half cents
28 per bushel, deliverable by them during all the month of September.

That pursuant to said order and direction said plaintiffs did, at said city of Baltimore, in the usual mode and course of business at said city, contract in their own name with a good and responsible purchaser for the sale of ten thousand bushels of said wheat, at the rate of one dollar and twenty-nine and a half cents per bushel, amounting in all to the sum of 12,950 dollars, payable upon the delivery b ythem of the wheat; and did in like manner contract with another good and responsible purchaser for the sale of fifteen thousand bushels thereof, at and for the price of one dollar and thirty cents per bushels, amounting in all to the sum of 19,500 dollars, payable upon the delivery by them of the wheat; and did in like manner contract with another good and responsible purchaser for the sale of the remaining five thousand of said 30,000 bushels of wheat, at and for the price of one dollar and thirty cents per bushel, amounting in all to the sum of 6,500 dollars per bushel.

That the wheat covered by all said last-named three sales, amounting in all to 30,000 bushels, was by the terms of said contracts of sale made deliverable at said city of Baltimore during all the month of September, 1877, at the seller's option.

29 And plaintiff further says that afterwards, to wit, on the 20th
day of August, 1877, said Irwin and Davis, being or pretending to be possessed or in expectancy of possessing other 40,000 bushels of red winter wheat, did order and direct the plaintiffs, as such commission

merchants, to sell for them, at plaintiffs' direction, said 40,000 bushels of wheat at said city of Baltimore, at the rate of above one dollar and twenty-five cents per bushel, deliverable by them at their option during all of the month of September, 1877.

That pursuant to said order and direction said plaintiffs did, at said city of Baltimore, in the usual mode and course of business at said city, contract in their own name with a good and responsible purchaser in the market for the sale of twenty thousand (parcel of said 40,000) bushels of wheat, at and for the price of one dollar and twenty-five and three-quarters cents per bushel, amounting in all to the sum of 25,150 dollars; and did in like manner, at the same place, contract with another good and responsible purchaser for the sale of five thousand (parcel of said 40,000) bushels of wheat, at and for the price of one dollar and twenty-five and one-fourth cents per bushel, amounting in all to the sum of 6,262.50 dollars; and did in like manner, at the same place, contract with another good and responsible purchaser for the sale of five thousand (parcel of said 40,000) bushels of wheat, at and for the price of one dollar and twenty-six
30 cents per bushel, amounting in all to the sum of 6,300 dollars; and did in like manner, at the same place, contract with another good and responsible purchaser for the sale of five thousand (parcel of said 40,000) bushels of wheat, at and for the price of one dollar and twenty-five and one-fourth cents per bushel, amounting in all to the sum of 6,262.50 dollars; and did in like manner, at the same place, contract with another good and responsible purchaser for the sale of the remaining five thousand of said 40,000 bushels of wheat, at and for the price of one dollar and twenty-five and one-half cents per bushel, amounting in all to the sum of 6,275 dollars.

The plaintiffs say that by each and all of said five last-named contracts for the sale and delivery of parcels of said 40,000 bushels of wheat, the wheat therein contracted to be sold was made deliverable at said city of Baltimore during all said month of September, 1877, at the seller's option, and the purchase price thereof was made payable on delivery.

And plaintiffs further say that afterwards, to wit, on the 27th day of August, 1877, the said Irwin and Davis, being or pretending to be possessed or in expectancy of possessing 10,000 other bushels of No. 2 red winter wheat, did order and direct the plaintiffs, as such commission merchants, to sell for them at said city of Baltimore said ten thousand
31 bushels of wheat, at the rate of one dollar and thirty-two cents per bushel, or higher if possible, deliverable during all the month of September, 1877, at the seller's option.

That pursuant to said order and direction said plaintiffs did on said day, at said city of Baltimore, in the usual mode and course of business at said city, contract in their own names with a good and responsible purchaser in the market for the sale and delivery of said ten thousand bushels of wheat, deliverable at said city of Baltimore, at the seller's option, during all said month of September, at and for the price of one dollar and thirty-two and one-quarter cents per bushel, amounting in all to the sum of 13,225 dollars, to be paid by the purchaser on delivery.

Plaintiff says that each and all the aforesaid sales of wheat were made at the highest and best prices and on the most favorable terms for said Irwin and Davis that it was practicable by the use of reasonable skill, care, and diligence to obtain in said market at the respective dates of sales, and that all said sales were promptly reported to and approved by said Irwin and Davis.

And the plaintiffs say that afterwards, to wit; at the dates of said respective sales, said Irwin and Davis, in consideration of the premises,
undertook and faithfully promised the plaintiffs that they would,
32 within a reasonable time thereafter, and in sufficient time to enable
the plaintiffs to fulfil and comply with their said several contracts
of sale as such commission merchants, ship, consign, and deliver to the plaintiffs, at said city, wheat of the quantity and quality called for by each of said contracts, and further that they would pay to the plaintiffs their reasonable commission as compensation for their services in that behalf.

But plaintiffs aver that said Irwin and Davis, disregarding their said promises and undertakings, wholly failed to ship, consign, or deliver said wheat or any part thereof for the purpose aforesaid, but, on the contrary thereof, did on the 17th day of September, 1877, by telegraphic message, order and direct the plaintiffs as follows: "Close deal, using your best judgment."

That at the date last aforesaid the price of No. 2 red winter wheat had largely advanced in said Baltimore market, and still further advance in price was apprehended.

That the meaning of said telegraphic message, as was well understood and intended by said Irwin and Davis and the plaintiffs, was that the plaintiffs should, using their best judgment, close all the aforesaid contracts for the sale of wheat deliverable in said month of September, either by ascer-
taining the difference between the said contract prices of sale and
33 the market value at said city of such wheat at the time of settle-
ment and paying the same to said respective purchasers, or by buying a like amount of like wheat for like delivery in said market and applying the same on the several contracts of sale aforesaid. But plaintiffs say that said Irwin and Davis wholly failed to furnish them any money for the purpose aforesaid.

And plaintiffs say that thereupon, using their best judgment for the interest of said Irwin and Davis, as well as for their own protection against their personal liability upon said contracts of sale, they did, as such commission merchants, afterwards, to wit, on the 20th day of September, 1877, contract for the purchase in said market for the use of said Irwin and Davis, and for the purpose aforesaid, fifteen thousand bushels of No. 2 red winter wheat, deliverable at said city in said month, at and for the price of one dollar and forty-eight cents per bushels, from different sellers, amounting in all to the sum of 22,200 dollars.

And afterwards, to wit, on the 21st day of September, 1877, the plaintiffs did in like manner and for like purpose, in like use of their best judgment, at said city, make further purchases from different sellers of No. 2 red winter wheat, deliverable at said city in said month, amounting in all to
twenty-five thousand bushels, at and for the price of one dollar
34 and fifty-three cents per bushel, amounting in all to the sum of
38,250 dollars.

And afterwards, to wit, on the 25th day of said month of September, the plaintiffs did in like manner and for the like purpose, and in like use of their best judgment, at said city, make further purchases from different sellers of No. 2 red winter wheat, deliverable at said city in said month, amounting in all to fifty-five thousand bushels, to cover and provide for the remaining amount of said sales, at and for the price of one dollar and fifty-three cents per bushel, amounting in all to the sum of 84,150 dollars.

Plaintiffs aver that the prices at which said several purchases were contracted were the prices obtaining in said market for such wheat so deliverable at the respective dates of purchase, and were the lowest at which they could, by the use of all reasonable diligence, then there purchase such wheat.

That they paid and satisfied all the purchase-money for the purpose aforesaid out of their own money and means, and did use and apply their said contracts of purchase and wheat so purchased in fulfilling and performing their several contracts for the sale of wheat herein mentioned, and in adjusting and satisfying their liability to their said vendees, and that they did fully perform and settle all the said contracts of sale.

35 Plaintiffs show that the aggregate contract price of the 95,000 bushels of wheat sold by them for and on account of said Irwin and Davis as in this count mentioned was one hundred and twenty-two thousand and sixty-five dollars, and that the aggregate contract price of said 95,000 bushels of wheat purchased by them as in this count mentioned for and on account of said Irvin and Davis, and to satisfy and settle said contracts of sale, was one hundred and forty-five thousand and seventy-five dollars, and that said plaintiffs were obliged to pay and did pay and advance in money the difference between said sums, to wit, the sum of twenty-three thousand and ten dollars, and that their reasonable commissions for their services in that behalf amount to the sum of four hundred and seventy-five dollars.

That all said moneys remain unpaid.

Third. And said plaintiffs, further complaining of said defendant, say:

That since a time prior to 20th day of August, 1877, the plaintiffs, as partners under the firm-name of George P. Williar & Son, have been engaged in business as flour and grain commission merchants in the city of Baltimore and State of Maryland, and as such have carried on the business of buying and selling flour and grain on commission for their customers and correspondents.

36 That on and before said 20th day of August, 1877, said defendant and one George M. Davis, now deceased, were partners under the firm-name of Irwin and Davis, doing business in the city of Brazil, in the State of Indiana, and engaged in the business, among other things, of buying and selling grain, and that they continued to carry on such business as such partners until the 24th day of October, 1877, when said George M. Davis died.

The plaintiffs say that said Irwin and Davis, on said 20th day of August, 1877, being or pretending to be possessed of twenty thousand bushels of No. 2 red winter wheat, or in expectancy of possessing the same, did order and direct the plaintiffs, as such commission merchants, to sell for them at plaintiffs' discretion, at said city of Baltimore, said 20,000 bushels of No. 2 red winter wheat, at the rate of one dollar and twenty-five cents per bushel or over, deliverable at any time, at the seller's option, in the month of October, 1877.

That it was and is the general usage of long standing, and well known and understood in all the large grain markets of the country, and especially in said city of Baltimore, for grain commission merchants making sales or purchases for future delivery for and upon the order and direction of their employers to make and contract the same in their own names, thereby becoming personally responsible to the persons with whom they so contract for the performance thereof, which general usage and custom was then there well known to said Irwin and Davis.

37 Plaintiffs say that pursuant to the order and direction aforesaid they, on said 20th day of August, 1877, at said city of Baltimore, in the usual mode and course of business at said city, did contract in their own names with a good and responsible purchaser in the market for the sale of said twenty thousand bushels of wheat, deliverable at said city at any time during the month of October, 1877, at the seller's option, at and for the price of $1.25⅝ per bushel, amounting in all to the sum of 25,325 dollars, payable on delivery of the grain.

And plaintiffs further say that afterwards, to wit, on the 3d day of September, 1877, said Irwin and Davis, being or pretending to be possessed or in expectancy of possessing ten thousand other bushels of No. 2 red winter wheat, did order and direct the plaintiffs, as such commission merchants, to sell for them at said city of Baltimore, at their, said plaintiffs' discretion, said ten thousand bushels of wheat, at one dollar and thirty-three cents per bushel or over, deliverable by them during the month of October at their option.

That pursuant to said order and direction said plaintiffs did, on said day, at said city of Baltimore, in the usual mode and course of business at said city, contract in their own names with a good and responsible purchaser for the sale of said ten thousand bushels of wheat, deliverable at
38 said city at any time at seller's option during the month of October, 1877, at and for the price of $1.34¾ *cents* per bushel, amounting in all to the sum of 13,475 dollars, payable on delivery of the grain.

Plaintiffs say that each of the aforesaid sales of wheat was made at the highest and best price and on the most favorable terms for said Irwin and Davis that it was practicable by the use of reasonable skill, care, and diligence to obtain in said market at the respective dates of sale, and that both said sales were promptly reported to and approved by said Irwin and Davis.

And plaintiffs say that afterwards, at the dates of said respective sales, said Irwin and Davis, in consideration of the premises, undertook and faithfully promised the plaintiffs that they would, within a reasonable time thereafter, and in sufficient time to enable the plaintiffs to comply with and perform their said contracts of sale as such commission merchants, ship, consign, and deliver to the plaintiffs at said city wheat of the quantity and quality called for by each of said contracts, and that meanwhile, according to the well-known and well-established commercial usage in that behalf, they would from time to time, in case of adverse fluctuations of the market, pay to the plaintiffs such sums of money upon request, known as margins, as would indemnify plaintiffs against loss in case of failure of said Irwin and Davis to ship and deliver the grain;
39 and further that they would pay to the plaintiffs their reasonable commissions as compensation for their services in that behalf.

But plaintiffs aver that said Irwin and Davis, disregarding their said promises and undertakings, wholly failed to ship, consign, or deliver said wheat or any part thereof for the purpose aforesaid.

That afterwards, to wit, on the 20th day of September, the market price of such wheat having advanced greatly beyond the prices at which the aforesaid sales had been contracted, the plaintiffs, by their sight draft upon said Irwin and Davis, requested them, said Irwin and Davis, to pay to the plaintiffs 2,500 dollars as a "margin" to indemnify them against loss upon their said contracts of sale.

That said requirement was reasonable and well justified by the usage in that behalf.

But plaintiffs say that said Irwin and Davis wholly failed and refused to pay said sum or any other sum of money for said purpose. That afterwards, to wit, on the 22d day of September, 1877, in answer to a request made to them by plaintiffs for instructions respecting the aforesaid sales of wheat for October delivery, said Irwin and Davis did, by their telegraphic
message of that date, order, direct, and advise the plaintiffs as fol-
40 lows, viz: "Yes; close all deals; are not able to pay drafts."

That in and by said telegraphic message said Irwin and Davis meant and intended to instruct the plaintiffs to close all outstanding contracts made by plaintiffs for them and by their direction, including those in this count mentioned for October delivery, either by ascertaining the difference between the said contract prices of sale and the market value at said city of such wheat at the time of settlement and paying the amount of such difference to the respective purchasers, or by buying a like amount of like wheat for like delivery in said market and applying the same on the several contracts of sale aforesaid, and to advise plaintiffs that they were unable to pay said draft for "margin" money; and plaintiffs say that they so understood said message.

And plaintiffs say that said Irwin and Davis not only failed to ship and deliver wheat as aforesaid, but they also wholly failed to pay or advance any money to the plaintiffs with which to so close said contracts of sale.

Plaintiffs say that pursuant to said telegraphic message, and using their best judgment and diligence for the interest of said Irwin and Davis, as well as for their own protection against their personal liability on said contracts
of sale, they did, as such commission merchants, afterwards, to wit,
41 on the 1st day of October, 1877, contract for the purchase in said
market, for the use of said Irwin and Davis, and for the purpose aforesaid, of five thousand bushels of No. 2 red winter wheat, deliverable at said city in said month, at and for the price of $1.41 *cents* per bushel, amounting in all to the sum of 7,050 dollars; and did also in like manner and for like purpose, at said city, contract for the further purchase of 5,000 bushels of such wheat, deliverable in the same month, at and for the price of $1.42 per bushel, amounting in all to the sum of 7,100 dollars.

And afterwards, to wit, on the 3d day of said month, they did, in like manner and for like purpose, at said city, contract for the further purchase of 10,000 bushels of such wheat, deliverable in the same month, at and for the price of $1.40 per bushel, amounting in all to the sum of 14,000 dollars.

And afterwards, to wit, on the 10th day of said month of October, they did, in like manner and for like purpose, at said city, contract for the further purchase of 10,000 bushels of such wheat, deliverable in the same month, at and for the price of $1.48 per bushel, amounting in all to the sum of 14,800 dollars.

Plaintiffs aver that the prices at which said several purchases of wheat were so contracted were the prices obtaining in said market for such wheat so deliverable at the respective dates of purchase, and were the
42 lowest at which they could, by the use of all reasonable diligence, then there purchase such wheat.

That they paid and satisfied all the purchase-money for the wheat so purchased by them for the purpose aforesaid out of their own money and means, and did use and apply their said contracts of purchase and wheat so purchased in fulfilling, performing, and settling their said several contracts for the sale of wheat as herein mentioned, and in adjusting and satisfying their liability to their said vendees, and that they did fully perform, settle, and adjust all said contracts of sale.

Plaintiffs show that the aggregate contract price of the 30,000 bushels of wheat sold by them for and on account of said Irwin and Davis as in this count mentioned was 38,800 dollars, and that the aggregate contract price of said 30,000 bushels of wheat for the purchase of which they contracted as in this count mentioned for and on account of said Irwin and Davis, and to satisfy and settle said contracts of sale, was 43,100 dollars, and that said plaintiffs were obliged to pay, and did pay in money, the difference between said sums, to wit, the sum of 4,300 dollars, and that their reasonable commissions for their services in that behalf amount to the sum of one hundred and fifty dollars.

That all said moneys remain wholly unpaid.

43 Fourth. And said plaintiffs, further complaining of said defendant, say that they are partners doing business as flour and grain commission merchants in the city of Baltimore and State of Maryland, under the firm-name of George P. Williar & Son, and that they have been such partners and carrying on said business since a time prior to the 12th day of July, 1877.

That on and before said 12th day of July, 1877, the defendant and one George M. Davis, now deceased, were partners under the firm-name of Irwin and Davis, doing business in the city of Brazil, Indiana, and engaged in the business, among other things, of buying and selling grain, and that they continued to carry on such business as such partners until the 24th day of October, 1877, when said George M. Davis died.

Plaintiffs say that on, to wit, the day and year last aforesaid, the said Irwin and Davis, as such partners, were indebted to the plaintiffs in the sum of one thousand dollars for work, labor, and services done and rendered for said Irwin and Davis by the plaintiffs, as such commission merchants, at the special instance and request of said Irwin and Davis.

And also in the further sum of twenty-five thousand dollars for so much money paid, laid out, and expended by the plaintiffs, as such commission merchants, for the use of said Irwin and Davis at their special instance and request.

44 And also in the further sum of twenty-five thousand dollars for so much money by the plaintiffs lent to said Irwin and Davis at their special instance and request, a bill of particulars of all which is filed herewith, marked "Exhibit A."

In consideration of which the said defendant, as surviving partner, afterwards, to wit, on the day and year aforesaid, undertook and promised the plaintiffs to pay the said several sums of money on request, yet though often requested he has not paid the same or any part thereof.

Wherefore, by reason of all the several causes of action in this declaration set forth, the plaintiffs pray payment for the sum of twenty-five thousand dollars against the defendant.

BAKER, HORD AND HENDRICKS.

45 *Messrs. Irwin and Davis, Brazil, Ind., in $^{a}/_{c}$ with Geo. P. Williar & Son.*

1877.				
Aug.	6.	To paid your sight draft		800 00
	9.	“ “ “ “ “	350 00 2,000 00	2,350 00
	11.	“ “ “ “ “		350 00
	15.	“ “ “ “ “	350 00 2,000 00	2,350 00
		“ purchase 10,000 bus. 2 red, to cover sale 1st ½ August, less 378.40 bus. per $^{a}/_{c}$ sales this date, 9,621.20 bus., as follows:		
		5,952.30 bus. 2 red wheat, 1.41½	8,422 78	
		3,310.10 “ “ “ “ 1.41	4,667 34	
		358.40 “ “ “ “ 1.41¼	506 62	13,596 74
	“	“ commission buying 9,621.20 bus., @ ½c		48 10
	17.	“ paid your sight draft		350 00
	18.	“ “ “ “ “	350 00 2,000 00	2,350 00
	“	“ purchase 20,000 bus. red wheat, viz:		
		5,000 bus. of R. F. Etzler & Co., 1.32½	6,625 00	
		5,000 “ “ D. Dows & Co., 1.32	6,600 00	
		5,000 “ “ “ourselves,” 1.31½	6,575 00	
		5,000 “ “ G. Young & Co., 1.31	6,550 00	26,350 00
	“	“ commission buying 29,000 bus., @ ½ c.		100 00
	22.	“ paid your sight draft		350 00
Sept.	7.	“ “ “ “ “		325 00
	18.	“ purchase 10,000 Sept. 2 red, @ 1.42½		14,250 00
		“ commission buying 10,000 bus., ½		50 00
		This purchase was of Milmire B. & Co., @ 1.42¾; but as market afterwards declined, we lose ¼ c. ourselves out of our comm's, because we bought too quick.		
	20.	“ purchase 15,000 Sept. 2 red wheat:		
		5,000 of Gill & Fisher, 1.48	7,400 00	
		10,000 of Barker & Guathmey, 1.48	14,800 00	22,200 00
	“	“ commission buying 15,000, ½ c.		75 00
		Carried forward		85,894 84
46	1877.			
		Dr. to amount brought forward		85,894 84
Sept.	21.	To purchase 25,000 bus. September wheat, 25,000, of David Dows & Co., 1.53		38,250 00
		“ commission 25,000 bus., ½ c		125 00
		“ purchase 55,000 bus. Sept., in “settlement:”		
		30,000 J. M. Parr & Son, $1.53;		
		5,000 Bailey, Ruse & Co., 1.53;		
		20,000 Milwine, Bodman & Co., 1.53;		
		55,000 bus. 2 red, @ 1.53		84,150 00
	“	“ commission buying 55,000 bus		275 00

Messrs. Irwin and Davis in $^a/_c$ with Geo. P. Williar & Son—Continued.

Oct.	1.	“ purchase 5,000 bus. Octo. wheat of August Junod, @ 1.41		7,050 00	
	“	“ commission 5,000 bus., ½ c		25 00	
	“	“ purchase 5,000 bus. Octo. wheat of Barker and Gratheney, @ 1.42		7,100 00	
	“	“ commission 5,000 bus., buying @ ½		25 00	
	3.	“ purchase 10,000 Octo. wheat: 5,000 of Wylie, Smith & Co.; 5,000 of Chas. Rouse; 10,000 bus., @ 1.40		14,000 00	
		“ comm's buying in 10,000 bus., ½		50 00	
	10.	“ purchase 10,000 bus. October wheat of C. C. Whiting & Co., @ 1.48		14,800 00	
	“	“ commission buying in 10,000, ½		50 00	
				$251,794 84	
		Cr.			
July	12.	By sale 10,000 bus. 2 red, to arrive 1st ½ August: 10,000 sold Le Doux, Gibbs & Co., $1.38¼; Less 378.40 fees p'r $^a/_c$ sales, 1 car August 15th; Balance 9,621.20, fees due Le Doux, Gibb & Co., @ 1.38½			13,325 54
		Amounts carried for'd		251,794 84	13,325 54
47	1877.			Dr.	Cr.
		Amounts brought forward		251,794 84	13,325 54
July	12.	By sale 10,000 August wheat, @ 1.38¼:			
		5,000 to Le Doux, Gibbs & Co., 1.38¼	6,912 50		
		5,000 “ ourselves, 1.38¼	6,912 50		
					13,825 00
	16.	“ sale 10,000 August wheat:			
		5,000 to Baker & Gwatheney, $1.45	7,250 00		
		5,000 to Milwine, Bodman & Co., $1.44	7,200 00		
					14,450 00
	17.	“ sale 10,000 September wheat to Le Doux, Gibbs & Co., @ 1.42			14,200 00
Aug.	4.	“ n't proceeds 2 cars wheat, Nos. 677 & 15180			994 83
	9.	“ “ “ 1 “ “ “ 1222			481 37
	13.	“ “ “ 1 “ “ “ 25902			448 17
	14.	“ “ “ 2 “ “ “ 27063 7309	468 13 417 15		
					885 28
	“	“ sale 5,000 bus. September wheat to J. M. Parr & Son, @ $1.32			6,600 00
	15.	“ net proceeds 1 car wheat, No. 5007			460 03
	16.	“ “ “ 4 “ “ “ 5029 21142 786 5094			1,727 97
	“	“ “ “ 2 “ “ “ 15335 543	314 92 365 88		
					680 80
	“	“ sale 10,000 bus. September wheat to Gill and Fisher, @ $1.30¾			13,075 00
	17.	“ sale 10,000 bus. Sept. wheat, 1.29½	12,950 00		
	“	“ “ 20,000 “ “ “ 1.30	26,000 00		
					38,950 00
		Sold to Harryman & Schroger, 15 M, 1.30	19,500 00		
		“ “ J. W. Flack, 5 M, 1.30	6,500 00		
		“ “ Milwine, Bodman & Co., 10 M, 1.29¼	12,925 00		
		Total result of sale	$38,925 00		

Messrs. Irwin and Davis in ℀ with Geo. P. Williar & Son—Continued.

	18.	“ net proceeds 1 car wheat, No. 15311			325 09
	20.	“ “ “ 4 “ “ Nos. { 25438 .. 173 25569 .. 7685 }			1,802 17
	“	“ sale 40,000 Sept. wheat, as follows:			
		10,000 bus. @ 1.26	12,600 00		
		10,000 “ @ 1.25¾	12,575 00		
		5,000 “ @ 1.25½	6,275 00		
		15,000 “ @ 1.25¼	18,787 50		
					50,237 50
		Amounts carried forward		$251,794 84	$172,468 75
48		Amounts brought foward		251,794 84	172,468 75
		Sale of 40,000 September wheat was as follows:			
		20,000 to J. M. Parr & Son, 1.25¾	25,150 00		
		5,000 “ “ 1.25¼	6,262 50		
		5,000 “ Milwine, Bodman & Co., 1.26	6,300 00		
		5,000 “ J. Knox & Co., 1.25¼	6,262 50		
		5,000 “ Gill & Fisher, 1.25½	6,275 00		
		Total result of sale	$50,250 00		
Aug.	20.	By sale 20,000 October wheat, 1.26⅝			25,325 00
		10,000 to Milwine, Bodman & Co., 1.26½			
		10,000 “ J. M. Parr & Son, 1.26¾			
		Average, 1.26⅝			
		1 car wheat, No. 8486	$486 76		
	22.	“ nett proceeds 3 “ “ “ 836, 570, 5179	$1,179 96		
					1,666 72
		1 “ “ “ 7319	$428 21		
	25.	“ “ “ 1 “ “ “ 715	$404 26		
					832 47
	27.	“ sale 10,000 September wheat to Gill & Fisher, @ 1.32¼			13,225 00
		1 car wheat, No. 15580	363 65		
	30.	“ n't proceeds, 1 “ “ “ 1902	425 69		
					789 34
Sept.	3.	“ sale 10,000 October wheat to J. M. Parr & Son, 1.34¾			13,475 00
	5.	“ n't proceeds, 2 cars wheat, Nos. 15151, 15622			977 90
	6.	“ “ “ 4 “ “ “ 215, 15543, 1774, 15241			1,923 79
	7.	“ “ “ 1 “ “ “ 15551			476 92
	8.	“ “ “ 2 “ “ “ 8113 & 25246			956 59
	10.	“ “ “ 1 “ “ “ 25821			473 48
	12.	“ “ “ 1 “ “ “ 1716			467 54
	13.	“ “ “ 1 “ “ “ 743			470 47
	14.	“ “ “ 2 “ “ “ 1922 & 641			967 92
		“ balance to close			17,297 95
				$251,794 84	$251,794 84
		To balance brought down		$17,297 95	

E. & O. C.
Baltimore, October 11, '77.

GEO. P. WILLIAR & SON.

49 And afterwards, to wit, at the November term of said court, on the 4th day of March, A. D. 1880, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, by their attorneys, and file their answer herein in the words following, to wit:

Answer of Irwin.

Par. 1. The defendant Irwin, for answer to the plaintiffs' complaint, denies each and every material allegation therein contained.

Par. 2. For further answer to plaintiffs' complaint defendant Irwin says that the account sued on grew out of certain transactions between plaintiffs and the late Davis, deceased, formerly a partner with defendant in the flour-milling business at Brazil, Indiana. That all said transactions between said Davis and plaintiffs were wholly without the knowledge or consent of defendant. That said transactions were of the following character, namely: That said Davis, pretending to act for and on behalf of the firm of Irwin and Davis, for the purpose of playing, betting, wagering, and gambling upon certain unknown and contingent events, to wit, upon the rise and fall of the prices of grain and provisions in the , entered into certain pretended dealings with plaintiffs in grain.

50 That in said pretended dealings plaintiffs pretended to act as the agents or brokers of said firm of Irwin and Davis in making the pretended purchases of grain, but without disclosing said pretended agency to the parties with whom said pretended dealings were had. That while said dealings purported upon their face to be actual purchases and sales of grain for future delivery, in truth and in fact said Davis did not at the time of said transactions or at any other time intend to or have the ability to carry out and complete said pretended purchases and sales either by the use of his own means or the use of the means of said firm, or by the use of both his own means and the means of said firm, and never did carry out said transaction. That it was the intention of said Davis to close all said transactions before the time for delivery or receipt of any of the pretended sales and purchases of grain arrived, by payment or receipt of the difference in price, according as such price should vary against them or in their favor.

That plaintiffs knew that said Davis was utterly unable to carry out the pretended contracts entered into by him, pretending to act for the firm of Irwin and Davis, either by using his own means or said firm's means, or both, and that he did not intend to carry out said pretended contracts, but only intended to wager, bet, and gamble upon the future prices of the market as aforesaid.

51 That the amount alleged to be due from defendant to plaintiff consists wholly of alleged losses on said alleged dealings, which were in fact gambling transactions, as aforesaid.

Par. 3. For further answer to plaintiffs' complaint defendant says that he was at the several times named in plaintiffs' complaint the partner of said George M. Davis, under the firm-name of Irwin and Davis, engaged in the business of buying wheat at Brazil, Indiana, manufacturing it into flour at Brazil, Indiana, and selling the manufactured products, and in no other business whatever. That the alleged dealings between plaintiffs and said firm were wholly between said plaintiffs and said George M. Davis (pretending to act on behalf of said firm), and were without the knowledge or consent of defendant and were wholly outside of the scope of the business of said firm of Irwin and Davis.

WILLIAMSON & DAGGY,
McGREGOR & COMPTON,
McDONALD & BUTLER,
Att'ys for Def't.

And afterwards, to wit, at the November term of said court, on the 11th day of March, 1880, before the honorable Walter Q. Gresham, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by McDonald and Butler, his attorneys, and files his 4th paragraph of answer herein, in the words following to wit:

52 Par. 4. For further answer, by way of set-off against plaintiffs' pretended claim, the defendant, as surviving partner of said firm of Irwin and Davis, that said plaintiffs are indebted to him, as such surviving partner, in the sum of twenty thousand dollars for merchandise sold and delivered to plaintiffs by said Davis, for and on behalf of said firm, though without the knowledge of this defendant, a bill of particulars of which is filed herewith and made part hereof, marked "Exhibit A;" and defendant offers to set off so much of said sum against any valid claim plaintiffs may have against said firm, and prays judgment over for twenty thousand dollars against plaintiffs, and for all proper relief.

McDONALD & BUTLER,
WILLIAMSON & DAGGY,
McNUTT, McGREGOR & COMPTON,
Att'y' for Def't.

Exhibit A.

Geo. P. Williar & Son to Irwin & Davis, Dr.

	To 406.50 bus. wheat, @ 1.52	618	39
	" 335.10 " " " 1.50	502	75
	" 397.30 " " " 1.30	516	75
	" 401.45 " " " 1.35	542	43
	" 378.40 " " " 1.38½	524	46
	" 321.40 " " " 1.23	395	65
	" 1,556.50 " " " 1.28	1,972	75
	" 1,565.30 { 782.30 @ 1.32 783 @ 1.32¼ }	2,068	42
	" 391 " " " 1.41½	553	27
	" 395.28 " " " 1.30	514	12
	" 359.20 " " " 1.35½	486	90
	" 791.50 " " " 1.40½	1,112	53
53	To 1,527 bu. wheat, @ 1.43	$2,183	61
	" 375.30 " " " 1.44	540	72
	" 753.20 " " " 1.44	1,084	80
	" 377.20 " " " 1.42	537	70
	" 380.10 " " " 1.40	532	23
	" 381 " " " 1.40½	535	30
		$15,242	77

And at the same time come the plaintiffs, by Baker, Hord and Hendricks, their attorneys, and file their reply to the 2, 3, & 4 paragraphs of answer herein in the words following, to wit:

Come now the plaintiffs herein and for reply to the second, third, and fourth paragraphs of said defendant's answer and set-off say:

1st. They deny each and every material allegation therein contained.

2nd. And for second and further reply to the 4th paragraph of said answer by way of set-off, said plaintiffs say that they fully paid and satisfied all the claims and demands therein contained long before the commencement of this action.

3rd. And for third and further reply by way of set-off to said 4th paragraph of said defendant's answer by way of set-off, said plaintiffs say that before the commencement of this action said defendant Irwin, as the surviving partner of George M. Davis, deceased, was and still is indebted to
these plaintiffs in the sum of nine thousand dollars, for money paid
54 and advanced, laid out and expended by these plaintiffs for the use
of defendent as such surviving partner, and at his special instance
and request a bill of particulars of which is filed herewith and made part hereof, and plaintiffs offer to set off so much thereof against any sum that may be found due defendant and demands judgment for three thousand dollars against said defendant and for all proper relief, &c.

BAKER, HORD AND HENDRICKS,
KNIGHT AND KNIGHT,
Att'ys for Pl'ffs.

And thereupon the cause coming on to be tried, now comes a jury, to wit W. D. Seaton, Rob't Browning, James Green, John D. Highway, Simeon Pierce, B. F. Welmore, H. R. Pershing, Geo. P. Dykeman, John Patterson, Jabez Smith, Daniel P. Monroe, and B. B. Williams, who being found qualified are now duly empannelled and sworn, and who having heard part of the evidence, are now by the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, at the November term of said court, on the12th day of March, A. D. 1880, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the parties by their respective attorneys, and also come the
jury heretofore empannelled and sworn, and who having further
55 heard the evidence in this cause are now by the court allowed to
separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the same term of said court, on the 13th day of March, A. D. 1880, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and also comes the jury heretofore empanneled and sworn, and who having further heard the evidence, are now by court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the same term of said court, and on the 15th day of March, A. D. 1880, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and at the same time comes the jury heretofore empannelled and sworn, and who having heard the residue of the evidence, are now by the court allowed to separate until the calling of this cause on to-mmorrow morning.

And afterwards, to wit, at the same term of said court, and on the 16th day of March, A. D. 1880, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit: 56

Come now the parties by their respective attorneys, and also comes the jury heretofore empannelled and sworn, and who having heard the argument of counsel and the charge of the court, now retire to their room to consider their verdict.

And afterwards, to wit, at the same term of said court, the following further proceedings in the above-entitled cause were had on the 17th day of March, A. D. 1880, before the Hon. Walter Q. Gresham, one of the judges of said court.

Come again the parties by their respective attorneys, and come now the jury and return into court the verdict following, to wit:

"We, the jury, find for the plaintiffs, and assess their damages at seventeen thousand six hundred and twenty-two dollars and seventy-eight cents.

"J. D. HIGHWAY,
"*For'man.*"

And the defendants thereupon moves the court for a new trial.

And afterwards, to wit, at the November term of said court, on the 24th day of March, A. D. 1880, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants by their attorneys and file a motion for a new trial herein in the words following, to wit:

57 The defendant in the above-entitled cause moves the court ot grant a new trial in the above-entitled cause for the following reasons:

1st. Because the court erred in ordering that said cause as originally transferred to this court stand as against the defendant John W. Irwin alone, and that plaintiffs have leave to proceed againt Isaac M. Compton, administrator of the estate of George M. Davis, deceased, by bill in chancery, said Compton, as such administrator, being a codefendant with John W. Irwin at the time of said transfer; to which order the defendant Irwin at time excepted.

2nd. Because the court erred in overruling the motion of the defendant to strike out and suppress certain depositions and parts of depositions, to wit:

1. Questions and answers 1 to 3 inclusive of the examination-in-chief of Francis T. Smith, and all exhibits with said deposition.

2. Questions and answers 1 to 12 inclusive in the examination-in-chief,

No. 1 redirect, No.' 1 to 3 when recalled in deposition of Robert Gwathway, and all exhibits therewith.

3. Questions and answers 1 to 11 in chief and 1 redirect of Henry A. Parr, and all exhibits therewith.

4. Questions and answers 1 to 8 in chief and 1 to 6 when recalled of David M. Tate, and all exhibits therewith.

5. Questions and answers to *to* 4 in chief of John G. Harryman, and all exhibits therewith.

6th. Questions and answers 1 to 6 in chief of James W. Flack,
58 and all exhibits therewith.

7th. Questions and answers 1 to 6 in chief of Reuben P. Etzler, and all exhibits.

8. Questions and answers 1 to 5 in chief and 1 to 3 redirect of James B. Beverly, and all exhibits therewith.

9. Questions and answers 1 to 5 in chief and 1 to 2 redirect of George Baily, jr., and all exhibits therewith.

10th. Questions and answers 1 to 4 in chief and 1 redirect of Charles D. Fisher, and all exhibits therewith.

11. Questions and answers 1 to 6 in chief of John Allen, and all exhibits therewith.

12. Questions and answers 1 to 5 in chief of Charles Rous, and all exhibits therewith.

13. Questions and answers 1 to 10 in chief of Gustavus W. Heet, and all exhibits therewith.

14. Questions and answers 1 to 6 in chief of James Knox, and all exhibits therewith.

16. Questions and answers 1 to 32 in chief and 1 to 3 when recalled of Franklin A. Noble, and all exhibits therewith.

17. Questions and answers 1 to 3 in chief of William F. Fuller, and all exhibits therewith.

18. Question and answers 1 to 9 in chief of Henry Zollicoffer, and all exhibits therewith.

19. Questions and answers 1 to 7 in chief of William P. Barndoller, and all exhibits therewith.

20. Questions and answers 1 to 7 in chief of John Bannister Hall, and all exhibits therewith.

21. Questions and answers 1 to 8 in chief of deposition of Henry
59 A. Parr, taken October 11, 1878, and all exhibits therewith.

22. Questions and answers 1 to 5 in chief of depositions of Franklin Noble, taken October 11, 1878, and all exhibits therewith.

23. Questions and answers 1 to in chief of deposition of James Knox, taken October 11, 1878, and all exhibits therewith.

To the overruling of which motion and to the admission of which evidence the defendant at the time excepted.

3rd. Because the court erred in the trial of said cause in admitting irrelevant, immaterial, and incompetent evidence over the objection of the defendant, to wit:

1. Admitting the depositions of each of the following witnesses to prove the customs of members of the Corn and Flour Exchange in dealing with each other, viz:

Francis T. Smith, Robert Gwathmay, Henry A. Parr, David M. Tate, John G. Harriman, James W. Flack, Reuben P. Etzler, James B. Beverly, George Bailey, jr., Charles D. Fisher, John Allen, Charles Rous, Gustavus W. Heet, James Knox, Reinhard J. Weekens, Franklin A. Noble, William F. Fuller, Henry Zollicoffer, William P. Barndoller, John Bannister Hall.

2. Permitting   Gambril to testify to the customs of the Corn and Flour Exchange of Baltimore.

3. Permitting plaintiffs to put in evidence the annual report for the year 1877 of the Corn and Flour Exchange of Baltimore,
60 containing the by-laws and rules of said Corn and Flour Exchange.

4th. Permitting the plaintiff Henry D. Willair to testify against the defendant, and permitting said plaintiff to testify to the customs of the members of the Corn and Flour Exchange of Baltimore.

4th. Because the court erred in the trial of said cause in the giving and refusing to give instructions to the jury as follows:

1. The court erred in giving to the jury each of the instructions given by the court upon its own motion and numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, to the giving of each of which instructions the defendant at the time excepted.

2. The court erred in refusing to give to the jury each of the instructions asked by defendant and numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 (A), 15, 16, 17, 18, 19, 19 (A), 20, 21, to which refusal to give each of said instructions the defendant at the time excepted.

5th. Because the verdict of the jury is not sustained by sufficient evidence.

6th. Because the court erred in the trial of said cause in excluding competent, relevant, and material evidence offered by defendant, to wit, the letter from George M. Davis to John W. Irwin, defendant, dated October 2d, 1877, to which exclusion of said evidence defendant at the time excepted.

McGREGOR & COMPTON,
J. A. McNUTT,
McDONALD AND BUTLER,
For D'f't.

61 And afterwards, to wit, at the November term of said court, on the 26th day March, A. D. 1880, before the honorable Thomas Drummond and Hon. Walter Q. Gresham, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by their respective attorneys, and the court having heard the argument of counsel, and being sufficiently advised in the premises, doth now overrule the motion for a new trial, and thereupon sixty days is granted to the defendants to file a bill of exceptions.

And thereupon the plaintiffs' attorneys move the court for judgment upon the verdict heretofore rendered in this cause. It is thereupon ordered by the court that the plaintiffs do have and recover of said defendants, John W. Irwin the said sum of seventeen thousand six hundred and twenty two and $\frac{78}{100}$ dollars (17,622.78), with interest at the rate of   per cent. per annum, together with their costs and charges in this behalf laid out and expended, taxed $.

62 And afterwards, to wit, on the 2d day of July, A. D. 1880, at the May term of said court, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by counsel, and by agreement it is ordered in open court that defendant have leave to file his bill of exceptions and supersedeas bond nunc pro tunc as of the 19th day of May, 1880; and now the defendant tenders his bill of exceptions, which is accordingly signed and sealed by the court, and filed and made part of the record in this cause, as of the 19th day of May, 1880, and his supersedeas bond, which is approved by the court and filed as of the 19th day of May, 1880.

And said bill of exceptions is in the words following, to wit:

Be it remembered that heretofore, to wit, on the 11th, 12th, 13th, 15th, and 16th days of March, 1880, being the 111th, 112th, 113th, 114th, and 115th judicial days of the November term, 1879, of said court, at the trial of the above-entitled cause, evidence was introduced tending to prove:

That the defendant, John W. Irwin, and one George M. Davis, who were step-brothers, became the owners as partners in the year 1872 of a flouring mill and appurtenances at Brazil, Clay County, Indiana, in which they had for two years or more prior thereto been interested.

63 That their contract of partnership pursuant to which they became the owners of said property, which was made verbally, contemplated the buying of grain and the manufacturing of it into flour and meal, and the disposal on the market of such grain as might accumulate in excess of what they required for manufacturing, and did not contemplate as between themselves the buying and selling of grain in large quantities for speculation.

That said Irwin resided at Butler, Pennsylvania, leaving the management of the business entirely to said Davis, and visiting Brazil but rarely.

That soon after the formation of said partnership said Davis, in the firm name of Irwin and Davis, and as part of the firm business, began and continued to ship corn and oats to Indianapolis and corn and flour to Baltimore, for sale and immediate delivery, in consignments not exceeding one thousand dollars in value each.

That appurtenant to the mill was a warehouse for the storage of grain, equipped with appliances for the loading and unloading of grain in bulk into and from cars.

That in the year 1875 divers such consignments of corn had been made to the plaintiffs at Baltimore for sale on account of said Irwin and Davis.

That from the foundation of said partnership, or soon thereafter, said
Davis conducted the correspondence connected with the business
64 upon paper bearing the following printed card or letter-head:
"Brazil Flouring Mills, Irwin and Davis, millers and dealers in grain, Brazil, Ind."

That in the correspondence with the plaintiffs, relating to said consignments of grain in the year 1875, paper bearing such printed cards or letter-heads was used, and that it was also so used in the correspondence relating to the transactions involved in this suit, and that the defendant John W. Irwin knew that such printed cards or letter-heads were being used by said Davis in conducting the correspondence of the firm.

There was also evidence tending to show that consignments of wheat had been made in the name of said Irwin and Davis to New York, Toledo, and Indianapolis for sale in 1877, and that during the year 1876 they had been large dealings in grain in Chicago, which were entered upon the books of the firm of Irwin and Davis, but subsequently to the last visit of Irwin to Brazil, prior to the death of Davis, and there was evidence tending to show that said Irwin was not informed of those dealings.

That for several years prior to the formation of said partnership, and
afterwards up to the close of the same, the principal business of said
65 mill was generally recognized in the community of Brazil as that
of merchant milling.

That no evidence was introduced tending to prove that said Davis had, prior to 1877, ordered any purchase of any kind of grain or merchandise in the Baltimore market, or in any Eastern market either for present or future delivery.

That the working capital of the firm of Irwin and Davis varied from $2,000 to $4,000, and their daily payments for purchases of wheat varied from $300 to $800 in the summer months.

That there was a conflict of evidence as to the capacity of said mill, but there was evidence tending to prove that the capacity of said mill for making flour was sixty barrels per day, and its average manufacture thirty barrels per day.

That about five bushels of wheat were required at said mill for the making of one barrel of flour.

That in the year 1877 said Davis shipped to plaintiffs during the months of July, August, and September thirty-one car loads of wheat, containing an average of about three hundred and eighty bushels each.

That all wheat so shipped was ordered sold at once, provided it could be sold on arrival at a price above that at which Irwin and Davis had ordered sales for same months' delivery; otherwise to go upon sales ordered by them.

That in the spring of 1876 plaintiffs sent to Irwin and Davis a cipher-
book for use in telegraphing.
66 That the first use of said cipher-book which appeared in the
correspondence which was introduced in evidence was by said
Davis, claiming to act for said firm of Irwin and Davis in 1877, on
July 12th, when he sent the following telegram to plaintiffs from Brazil:

"Cadet business fancy abstain at or over. Bravely lament.
"IRWIN AND DAVIS."

Which means, "Sell to arrive 20,000 bushels No. 2 red winter wheat at or over one dollar and thirty-nine cents. Answer immediately."

That plaintiffs on same day replied to said telegram by telegram to Irwin and Davis.

"Can place at thirty-eight first half August."

That said Davis claiming to act for Irwin and Davis on the same day telegraphed:

"Sell ten first-half and ten last-half if possible.
"IRWIN AND DAVIS."

That plaintiffs on the same day telegraphed in reply:

"Sold ten August thirty-eight quarter ten first-half thirty-eight half."

That plaintiffs being unable to find buyers at said price for the whole of said amount ordered sold, purchased five thousand bushels of said wheat themselves upon which plaintiffs sustained loss and Irwin and Davis made a profit which they were given credit for on account and received due notice of from plaintiffs, without objection; said five thousand bushels were
67 not embraced in the special counts of the declaration, but were sold prior to the sales therein mentioned and were included in the bill of particulars which was filed with the common counts.

That on July 16th, 1877, said Davis telegraphed plaintiffs:

"Sell five thousand two all August wheat above forty-three.

"IRWIN AND DAVIS."

To which plaintiffs replied same day by telegram to Irwin and Davis:

"Sold five August one forty-four; have you any more to offer?"

To which said Davis replied same day by telegram:

"Yes; sell five more at or over forty-five.

"IRWIN AND DAVIS."

To which plaintiffs replied to Irwin & Davis same day by telegram:

"Sold five August two red forty-five. Strong and active."

That on July 17th, 1877, said Davis telegraphed plaintiffs:

"Sell five two September wheat above forty or ten above forty-two.

"IRWIN AND DAVIS."

To which plaintiffs replied by telegram same day to Irwin and Davis:

"Sold ten September forty-two. Market off. Probably go lower."

That said Davis on August 14th, 1877, telegraphed plaintiffs:

"Give quotations first-half August and September wheats, also number of our cars received.

"IRWIN AND DAVIS."

68 To which plaintiffs answered by telegram to Irwin and Davis same day:

"First half 41¾, September 33¼, 2 cars rejected arrived."

That on same day, said Davis telegraphed plaintiffs:

"Cover first half when you think best, and sell 10 September, above 32.

"IRWIN AND DAVIS."

To which plaintiffs replied same day by telegram to Irwin and Davis:

"Sold five September thirty-two. If unsatisfactory, answer quick. Will cancel. Could not place ten. Best bids now thirty-one half, and very limited demand."

And on August 15th, 1877, plaintiffs telegraphed Irwin and Davis:

"Bought to cover first half August, about average forty-one quarter. Arrived five cars, grading steamer, worth about twenty-eight. Shall we sell or hold. Quote August closing thirty-eight, September thirty-one half. Shall we sell No. two on arrival or put on contract?"

That on August 16, 1877, said Davis telegraphed plaintiffs:

"Sell ten September or October, above thirty.

"IRWIN AND DAVIS."

To which plaintiffs replied same day by telegram to Irwin & Davis:

"Sold ten September thirty-three quarter. Quote October twenty-nine half."

That on August 17th, 1877, said Davis telegraphed plaintiffs:

"Cabbage by path gormand abstain at braggart backward or buxom braggart and dolly business, golden under brandish.

"IRWIN AND DAVIS."

69 Which when translated reads: "Sell 30,000 September No. 2 red at one twenty-nine and one-half, or 25,000 one twenty-nine, and buy at your discretion, twenty thousand August, under one thirty-four.

"IRWIN AND DAVIS."

To which plaintiffs replied to Irwin and Davis, by telegram same day:

"Sold ten at twenty-nine half, and twenty at thirty, closes twenty-nine quarter September, thirty-five August."

That on August 18th, '77, plaintiffs telegraphed Irwin and Davis:

"Bought in twenty August, at average less than thirty-two. Quote September about twenty-five to half."

That on August 20th, 1877, said Davis, in the name of Irwin and Davis, telegraphed pl'ffs:

"Cable by road, abstain gounand above brace and report by wire.

"IRWIN AND DAVIS."

Which when translated reads: "Sell at your discretion 40,000 No. 2 red winter wheat September, above one twenty-five, and report by wire.

"IRWIN AND DAVIS."

To which plaintiffs replied to Irwin and Davis, same day by telegram:

"Sold 40 September , average over twenty-five half. Think can place October twenty-five. Answer quick."

To which said Davis replied, in name of Irwin and Davis, same day by telegram in cipher, which translated reads:

"Sell at your discretion 20,000 October No 2 red winter wheat at one twenty-five or over."

To which plaintiffs replied same day by telegram:

"Sold twenty October, twenty-six ⅝*ths*. Quote September seven ¾*ths*."

70 That on August 22, '77, said Davis, claiming to act for Irwin and Davis, telegraphed plaintiffs:

"Sell ten September above thirty-two."

IRWIN AND DAVIS.

And on same day plaintiffs telegraphed Irwin and Davis:

"Fifty thousand just sold at thirty-one and quarter. More offered. Can place thirty-one. Possibly better."

That on August 23, '77, said Davis, claiming to act for Irwin & Davis, telegraphed plaintiffs in cipher, which, translated, reads:

"Buy at your discretion forty thousand September, whenever you think has touched bottom for the present. Wire us."

IRWIN AND DAVIS.

That on August 24, '77, said Davis, claiming to act for Irwin & Davis, telegraphed plaintiffs:

"Order to buy countermanded. Order to sell open."

IRWIN AND DAVIS.

That on August 25, '77, said Davis, claiming to act for Irwin and Davis, telegraphed plaintiffs in cipher, which, translated, reads:

"Sell at your discretion ten thousand, if you think best."

IRWIN AND DAVIS.

That on August 27, '77, plaintiffs telegraphed Irwin & Davis:

"Present indications, September will bring thirty-two. Shall we sell?"

To which said Davis, claiming to act for Irwin and Davis, replied by telegram same day:

"Yes, or higher, if possible."

IRWIN AND DAVIS.

To which plaintiffs replied by telegram to Irwin and Davis same day:

71 "Sold ten September, thirty-two. Quote best bid now, too."

That on September 3d, '77, said Davis, claiming to act for Irwin and Davis, telegraphed plaintiffs in cipher, which, translated, reads:

"Sell at your discretion ten thousand No. two red, October, one thirty-three or over."

IRWIN AND DAVIS.

To which plaintiffs replied same day by telegram to Irwin and Davis:

"Sold ten October, thirty-four three-quarters. Quote September thirty-seven."

That on September 17, '77, said Davis, claiming to act for Irwin and Davis, telegraphed plaintiffs:

"Close deal, using your best judgment.

"IRWIN AND DAVIS."

To which plaintiffs replied to Irwin and Davis by telegram same day:

"Closes forty-three half, has sold four. Please give definite instructions immediately. Don't like to use our judgment. Prices look big to us."

That on September 18, '77, plff's telegraphed Irwin and Davis:

"September forty-three, has sold forty-four. Please give instructions."

Also in a separate telegram:

"No instructions; and as you said use our judgment, thought best to buy down with market. Bought ten September forty-two half."

And on September 19, '77, plaintiffs telegraphed Irwin and Davis:

"Closes forty-one half. Bought none. Think will decline later."

And on September 20, '77, plaintiffs telegraphed Irwin and Davis:

72 "September forty-six. Please give full instructions. At present crisis we don't like to act without positive and definite instructions."

To which said Davis, claiming to act for Irwin and Davis, replied by telegram same day:

"Close deal as fast as you prudently can."

IRWIN AND DAVIS.

To which plaintiffs replied to Irwin and Davis by telegram same day:

"Bought fifteen forty-eight, has sold nine half Closes seven half bid. Sawyer, Continental agent, Cincinnati, says 'telegraphed to Indianapolis, Send your cars."

That on September 21, '77, plaintiffs telegraphed Irwin and Davis:

"Bank advises our drafts dishonored. Please immediately explain its meaning."

And in a separate telegram:

"Please explain meaning of draft being dishonored. Answer at once."

And in a separate telegram:

"Bought twenty-five September fifty-three. Has sold so high as fifty-five. Do you want your October covered also? Quote thirty-eight half. Please answer immediately, explaining without fail why draft was not paid."

To which telegrams the wife of said Davis answered by telegram Sept. 21, '77:

"Mr. Davis is sick. Have sent for Mr. Irwin."

MRS. G. M. DAVIS.

That on September 22, '77, said Davis, claiming to act for Irwin and Davis, telegraphed plaintiffs:

73 "Yes; close all deals. Are not able to pay drafts."

IRWIN AND DAVIS.

That on September 22, '77, plaintiffs telegraphed Irwin and Davis:

"Please remit or ship if can't pay drafts. We have to put up margin here."

And in a separate telegram same day:

"Did not think prudent to buy to-day. Will hold order open to use our discretion as directed. Quote September fifty to four, October thirty-nine."

And on September 25, '77:

"Settlements September forced to-day at fifty-three. Bought yours in."

There was also evidence tending to show that during the progress of the business between the plaintiffs and Irwin and Davis in the summer and fall of 1877, and during the period covered by the foregoing telegraphic correspondence, there was also a correspondence between the parties in relation thereto by letters, and the same was in the name of Irwin and Davis, and on their part was upon paper having the letter-head aforesaid, and that during that time there was no personal acquaintance between the plaintiffs and Irwin and Davis, or either of them, except that on the 31st of August, 1877, one of the plaintiffs and said Davis had a brief interview at the railroad station at Brazil, and that the plaintiffs had no knowledge that either of them resided elsewhere than at Brazil, Indiana, nor did they know which of them conducted the business and the correspondence.

74 There was also evidence tending to prove that plaintiffs, shortly after the commencement of said telegraphic orders, had examined the standing of Irwin and Davis through a mercantile agency and by inquiry among members of the corn and flour exchange, and from these investigations understood that they were strong; that Davis was worth $20,000 or $25,000, and Irwin was worth from $200,000 to $300,000.

There was evidence tending to prove that the total wheat crop of Clay County, Indiana, in 1876 was 105,690 bushels, and in 1877 was 171,053 bushels. This was an official estimate made by a State officer.

That there were in 1877 about ten flour mills in Clay County, Indiana, most of them custom mills.

That wheat was brought to market at Brazil from some parts of the counties of Parke, Clay, Putnam, and Vigo and Owen, in which counties there was evidence tending to show that the total wheat crop in 1876 was 682,250 bushels, and in 1877 was 1,091,511 bushels by official estimate as given above.

That the actual shipments of wheat made by said Irwin and Davis from Brazil, from December, 1874, to October, 1877, when said partnership closed, amounted to 15,273 bushels.

That the amount of wheat shipped in by rail by said firm for use in said mill in the same time was 22,378 bushels.

That in the same time the amount of corn shipped out by said
75 firm from Brazil was 17,407 bushels, and the amount shipped in
by rail for use in said mill 22,532 bushels.

There was evidence tending to show that the plaintiffs during and prior to the transactions in question were commission merchants and brokers engaged in the business of buying and selling grain and flour on account of their customers, under the firm-name of George P. Williar & Son, at Baltimore, and that they were members of the corn and flour exchange of that city, at and through the members of which substantially all the business of buying and selling grain at that city was done.

There was evidence tending to show that among the general usages and customs obtaining at said city among grain commission merchants were the following, which were well known and which had long existed and been uniformly observed among the members of said corn and flour exchange and others engaged in the buying and selling of grain on commission at said city, viz:

1st. That a commission merchant buying or selling grain upon the order of a customer for future delivery entered into such contract in his own name, thereby becoming personally responsible to the party with whom he contracted for the performance of the contract, the name of his principal
being never, or but rarely, disclosed.

76 2d. That such commission merchant held himself and stood re-
sponsible to his principal or customer for the performance by the other party with whom he entered into such contract of purchase or sale of such contract, and for making good the contract to his principal in case of the insolvency or default from any cause of such other party.

3d. That purchase or sales to fill orders of customers are usually made on the floor of the corn and flour exchange, by open public offer to the members of the board there assembled. That when it so occurs as that a commission merchant, who upon the order of one customer has sold to (or vice versa purchased from) another commission merchant grain for a certain future delivery, and afterwards, upon the order of another customer, buys (or vice versa sells) a like amount of like grain for the same future delivery, from (or to) the same commission merchant, the two commission merchants as between themselves set off one contract against the other and mutually surrender or cancel them, settling between them the difference in price, each substituting on his books in the place and stead of the other the new or second customer, upon whose order he made the second purchase or sale. Thus if commission merchant A, upon the order of his customer X, has sold grain for a designated future delivery to commission merchant B, and afterwards upon the order of customer Y, 77 buys like grain for like delivery from B, A and B adjust the difference, cancel their contracts, and surrender any margins that may have been put up by them, and in such case A substitutes his second customer Y in place of B, so that the grain he had sold on the order of X would be delivered to Y instead of to B; A standing as guarantor to Y that X will deliver the grain, and to X that Y will receive and pay for it, and that X shall receive the full price at which the grain had been contracted to B.

4th. That where such second transaction is not with the same commission merchant with whom the first had occurred, but a different one, and it is found that a circuit of like contracts exists, by which commission merchant A has sold grain to merchant B, who has sold like grain to C, who has made like sale to A, the commission merchants settle as among themselves by what is called a "ring." The parties in such case do not make successive deliveries until the grain comes round again to the commission merchant from whom it started, nor does each buyer pay the full amount of his purchase money to his immediate seller, but receives or pays, as the case may be, the amount of the net profit he would have received or of net loss he would have sustained if the settlement has not been made by a "ring."

In such case all margins put up by the commission merchants 78 are restored, the contracts surrendered, and the contracts or orders of their undisclosed principals, upon whose instructions they had entered into those contracts, are held in lieu of the contracts so surrendered, each commission merchant being responsible to each of his customers for performance by the other.

There was evidence tending to show that all the contracts, whether of sale or purchase, made by the plaintiffs pursuant to the telegraphic messages of Irwin and Davis, were made by the plaintiffs in their own names in such manner as that they became responsible for the performance thereof. That they held themselves responsible to Irwin and Davis, as guarantors, for the payment for all the wheat sold by them on account of Irwin and Davis at the full prices of the respective sales.

The evidence tended to show that Irwin and Davis did not consign or deliver to the plaintiffs any of the wheat so contracted by plaintiffs to be sold on their account except one car-load.

That they had during said months consigned other wheat to plaintiffs, as such commission merchants, but which, pursuant to their orders as hereinbefore mentioned, had been sold on its arrival, and had not been applied upon the contracts of sale for future delivery.

There was evidence tending to show that the plaintiffs, by several letters and telegrams, urged Irwin and Davis that they should ship the 79 wheat so that plaintiffs might deliver it in performance of their said contract of sale, and that by divers letters signed Irwin and Davis, shown upon the trial to be in the handwriting of said Davis, the reason assigned for not shipping to plaintiffs the wheat so contracted to be sold on their account was the impossibility of getting cars in which to ship it.

There was evidence tending to show that plaintiffs performed some of the contracts of sale so entered into by them on account of Irwin & Davis by delivering the wheat called for by the contracts to the purchasers (the amount delivered not exceeding 40,000 bushels), and settled the remainder thereof by paying to the purchasers the difference between the contract price and the market price of such wheat, the same being greatly in excess of the contract price.

There was evidence tending to show that after the making of divers of the contracts for sale of wheat in the declaration mentioned, which were made to members of said Corn and Flour Exchange, the same were, before the expiration of the respective times therein named for the delivery of the wheat, settled and canceled as between the plaintiffs and the said respective parties with whom they had, in the first instance, contracted said sales by mutual surrender of contracts pursuant to the customs aforesaid.

80 And that the orders of customers in the fulfillment of which said canceled contracts had been made were substituted by the plaintiffs in lieu of such cancelled or surrendered contracts, and held in the lieu and stead thereof for the use and benefit of said Irwin and Davis, in accordance with the usages and customs aforesaid, the plaintiffs standing as guarantors to said Irwin and Davis that the respective parties so ordering the wheat would accept and pay for it on delivery, and that said Irwin and Davis should receive the full price at which the respective sales on their behalf had originally been made.

That evidence of the general observance of said custom among members of the said corn and flour exchange, and of the dealings aforesaid between plaintiffs and said Irwin and Davis, was the only evidence given as tending to show knowledge on the part of said Davis or said firm of Irwin and Davis, of the customs of said corn and flour exchange and members thereof. That said corn and flour exchange of Baltimore was an association, the members of which only were permitted to contract with each other, on 'change for the purchase and sale of merchandise.

That under the contracts for the sale of wheat made by the plaintiffs in the declaration mentioned, the wheat was deliverable at the seller's option, at any time within the time named for delivery in the respective contracts.

81 That there was evidence tending to prove that the first actual knowledge which defendant had of the said transactions between said Davis, claiming to act for said firm of Irwin and Davis, and plaintiffs, was in October, 1877, and after all said transactions had been finished.

That on September 1st, 1877, plaintiffs, in a letter of that date to Irwin and Davis, wrote: "We trust you will hurry along your shipments, now having considerable September wheat sold, it will take you some time to get it all in, if you propose shipping to fill your deal. * * * We think Sept. is largely oversold everywhere."

That on September 3d, '77, plaintiffs, in a letter of that date to Irwin and Davis, wrote: "Are inclined to think there will be a squeeze here during Sept., and we trust you will use every exertion to push your stuff along. The longs last month were very moderate in their demands, but they brag of pushing the shorts to the wall this month. * * *

Unless receipts are very heavy, and we have an accumulation of stock, we think they will do it from present indications. European shippers are not as well situated this month to let the burnt man off easy as last month, they had their cargo's sold to Europe for August or September shipment, as part of the August shorts have been carried into this month, but cannot
be extended again to October. And we know Sept. is largely over-
82 sold. We have a great deal sold for Western % that we know won't
be shipped, but will have to be covered here. So, as we said before, we trust you will make every exertion to get yours in if you propose filling sales by shipments. You have 105 M sold at an average of about $129\frac{3}{4}$ and at to-day's figures the market is about $8,000 against you. If there is any further advance we will have to call on you for margins; so, to obviate this, you might let stuff come along without drafts till you have good margins with us."

That in a letter of Sept. 7, 1877, plaintiffs wrote to Irwin and Davis:

"Owing to very light receipts you will note spot is being pushed up, and speculators are trying for a corner on 1st $\frac{1}{2}$. * * * No legitimate trading. Shippers are entirely out of the market, claiming that they can't pay over $1.32 for wheat to ship. Present prices are purely speculative, and kept up by the 'bulls,' some of whom are heavily loaded, and if there is a break, it will go fast."

That on Sept. 17, 1877, in a letter of that date, plaintiffs wrote to Irwin and Davis:

"Have your t'g. this p. m., just after close of 'change, to close deal, using our judgment. This is a matter in which we hardly like to use our judgment. The loss is very heavy one to you, and under the circumstances we would like some definite instructions from you. We must acknowledge we are
'beat' as to the way this and other markets have gone, and every-
83 body else in the trade is equally surprised with us at present
prices. September is undoubtedly largely oversold, but there is one point, in fact two, to look at before getting panicky at the way prices have run up; they are now 7 or 8 c. above a shipping limit, and shippers are out of the market entirely again, notwithstanding the heavy short interest in Sept. We venture to say if receipts would only increase prices would not be sustained, because there is not much to go out for want of ton'age, and if we had an accumulation of stock the longs would be glad to sell out and take October at the ruling difference.

"European shippers have nearly all their cargo's sold for September or October loading now, and if the difference widens they will be apt to unload September and take in October, and we think 'longs' on Sept. will do the same. These changes, however, will only occur in case there is an increase in receipts & stocks.

"Why is it that you have been sending forward so little wheat?

"Yours, truly,

"GEO. P. WILLIAR & SON.

"We beg to-day to enclose 7 d'f's, $2,500, margins. Please honor."

That on the 19th day of September, 1877, letter of plaintiffs to Irwin and Davis contained the following:

"Saw Sawyer, agent of Continental Line, of Cincinnati, Ohio, and he says he will telegraph to send you all the cars you wanted, and presume he has done so."

84 That on September 20, '77, plaintiffs in a letter of that date to Irwin and Davis, wrote: "We all looked for heavy receipts of wheat during this month, and have been fooled badly. There is one feature, however, about the market at present, which is favorable to shorts. There are no vessels at hand, nor is it likely any can get here this month to take away over 3 or 400 M, but even if could take that much we understand receipts on the road now are quite heavy, comparatively, and if stock does accumulate, prices must go down. There certainly can't be many shorts out now, and as soon as they are all covered, prices must approximate October. Passed T | d'f't $2,500 to-day on you. Please honor."

That on September 25, '77, in a letter of that date, plaintiffs wrote Irwin and Davis: "The long interest forced settlement to-day at 1.53, at which price we bought in your September to cover. We were actually forced into this, and had to make the very best settlement we could, and the longs said if we did not settle they would run the price up to 1.60 or 1.70, and they undoubtedly could have done it, as full 3 times as much was sold as could possibly come in."

There was also evidence tending to prove that one principal reason why
the supply of wheat at Baltimore in the latter part of September
85 fell short of the amount sold there for September delivery, and
why there was a consequent advance in price, was that persons in
the country who had contracted to sell wheat to Baltimore buyers for that month's delivery, had availed themselves of advancing prices in other markets, and failed to ship wheat to fill their Baltimore contracts.

That the annual report of the Baltimore Corn and Flour Exchange for the year ending December 31, 1877, showed the amount of No. 2 red winter wheat inspected for the months of August, September, and October, 1877, as follows:

August.	By rail, 1,755 cars	666,900	bushels.
"	By water	16,561	"
		615	
September.	By rail, 1,619 cars	615,220	"
"	By water	73,212	"
October.	By rail. 1,692 cars	642,960	"
"	By water	98,192	"
	Total	2,113,045	"

There was evidence tending to prove that the moneys advanced by the plaintiffs for Irwin and Davis in connection with the transactions in controversy, together with a reasonable compensation for their services in that
behalf, amounted in all to the sum of seventeen thousand six hun-
86 dred and twenty-two dollars and seventy-eight cents.

That defendant, at the time said evidence was given as to the customs of said corn and flour exchange of Baltimore and members thereof, objected to the introduction of the same on the ground that the defendant was not bound by such customs, and because no evidence had been introduced tending to prove that said defendant or said Davis, or said Irwin and Davis, had any knowledge of said customs, which objection was overruled by the court, to which ruling defendant at the time excepted.

That defendant offered to introduce in evidence a letter from said George M. Davis to defendant, having first proved that said letter was in the handwriting of said Davis and signed by him; which letter reads as follows:

[J. W. Irwin. Brazil Flour Mills. Geo. M. Davis. Irwin and Davis, millers and grain-dealers.]

BRAZIL, IND., *October* 2, 1877.

BRO. WILS: You can do no good by coming here now. I have been taken in and done for by a lot of grain gamblers. The attorney, Mr. Compton, says you cannot be held liable for what I have done outside of milling business; but if you come here they will get service on you, and
give you trouble. I propose to stand the fight and acknowledge
87 the whole gambling game, as it will prevent my over going into
that business again. Will try and send you some money on house next week.

Yours, GEO. M. D.

To the introduction of which plaintiffs objected, and the court sustained the objection and refused to admit said letter, to which ruling of the court defendant at the time excepted.

And thereupon the defendant asked the court to give to the jury each of the following instructions of law as applicable to said evidence:

88 In the circuit court of the United States for the district of Indiana.

GEORGE P. WILLIAR ET AL.
v.
JOHN W. IRWIN.

The defendant in the above-entitled cause asks the court to give to the jury each of the following instructions:

1. This is an action brought by plaintiffs against the defendant as surviving partner of the late firm of Irwin and Davis, to recover a balance alleged to be due from said firm of Irwin and Davis to plaintiffs. The transactions out of which it is claimed this balance grew were certain sales and purchases of wheat for future delivery, claimed to have been made by plaintiff for said firm of Irwin and Davis upon the orders of said firm. The defendant denies his liability to plaintiffs for the alleged balance, upon two grounds.

The first ground is that the transactions out of which the alleged balance grew were transactions made by George M. Davis, a member of the firm of Irwin and Davis, in the name of said firm, but without the actual knowledge of defendant, and were not bona fide sales and purchases, but were mere
shams for the purpose of playing, betting, wagering, and gambling
89 upon the rise and fall of the price of wheat, and that plaintiffs knew
said facts, or were bound to know them, by reason of their knowledge of facts showing that it was the intent to gamble on prices.

The second ground of defence is that the transactions out of which the alleged balance grew were made by George M. Davis, in the name of the firm of Irwin and Davis, but without the knowledge or consent of the defendant, and that such transactions were in fact outside the scope of the partnership business of the firm of Irwin and Davis, and that plaintiffs had reason to know that such transactions were outside the firm business.

2. The plaintiffs, in order to make out their *firm a* facie case, must show that the transactions out of which the alleged balance grew were made upon orders from the firm of Irwin and Davis, and must also show that those transactions were such as they had a right to believe, from what knowledge they had of the business of Irwin and Davis, were within the regular business of said firm.

3. The plaintiffs claim to have dealt with the firm of Irwin and Davis. In dealing with said firm plaintiffs were bound to know what the business of that firm was, and if they chose to deal with said firm in matters outside the scope of that business they cannot recover against defend-
90 ant unless he knew of such dealings and did not dissent therefrom.

4. The scope of the partnership business is to be determined by you considering all the evidence introduced upon that subject.

The fact that Irwin and Davis were engaged in the milling business at Brazil, Indiana, and also shipped grain to some extent from that point in amounts of 1 to 4 car loads, for immediate sale, would not of itself justify plaintiffs in believing that the scope of the business of said firm embraced the sale of grain in amounts of 10,000 to 40,000 bushels for future delivery.

5. Plaintiffs are not bound to know the precise limit of the partnership business of the firm of Irwin and Davis, but if they had had transactions for a year or more with the firm of Irwin and Davis, prior to those transactions out of which the alleged balance grew, and by such prior transactions had become familiar to some extent with the general amounts of the dealings of said firm, the plaintiffs had no right to suppose, without inquiring as to the fact, that the business of said firm had suddenly changed so as to embrace dealings of fifteen to fifty times the amount of the largest of any such prior dealings.

6. The fact that the firm of Irwin and Davis may have been in
91 the habit of shipping flour and grain to plaintiffs in amounts of 1 to 4 car loads, for immediate sale, would not of itself justify plaintiffs in believing that the business of Irwin and Davis embraced the sale for future delivery of wheat in amounts of from 10 to forty times the amount of such shipments.

7· The fact that the firm of Irwin and Davis shipped wheat for immediate sale would not of itself justify plaintiffs in believing that the business of Irwin and Davis embraced the selling of wheat for future delivery.

8. The place at which the firm of Irwin and Davis was located, the probabilities of their being able to get the amount of wheat they had sold for future delivery; the ability or lack of ability of the firm to handle the amount of wheat ordered sold; the amount of dealings in former years, and the amount of actual shipments as compared with sales ordered are proper matters for you to consider in determining what the scope of the business of Irwin and Davis was, and whether it embraced such transactions as those out of which the alleged balance mentioned in plaintiffs' complaint grew.

9. You will bear in mind that the burden is on the plaintiffs to establish by a preponderance of the evidence that the transactions out of which the alleged balance grew were within the scope of the partnership
92 business of Irwin and Davis. If they have failed to do so, your
verdict must be for defendant.

10. By the scope of the partnership business of Irwin and Davis as used in the preceding instructions is meant the apparent scope of that business, upon which third parties dealing with the firm would have a right to rely.

And in determining what that scope was you will take into consideration the means of knowledge the plaintiffs had, including all dealings prior to the contested transactions, the amount of such prior dealings, the nature of those prior dealings, the known location of the firm, and the general reputation as to the character of the business of the firm of Irwin and Davis.

11. If you believe from the evidence that the principal business of the firm of Irwin and Davis was in fact and by general reputation the management of flouring-mills at Brazil, Indiana, buying wheat and corn and manufacturing it into flour and meal and selling the manufactured product, and that as an incident to said principal business they took all such wheat and corn as was offered at their mills and shipped for immediate sale what they did not need for use, plaintiff would not be authorized to infer from such facts that the scope of the business of said firm embraced selling and buying wheat in large amounts in Baltimore,
93 Maryland, for future delivery.

12. If you believe from the evidence that plaintiffs had, in the years 1875 and 1876, a number of dealings with the firm of Irwin and Davis in amounts not as much as $1,000 in any one transaction, and amounting during those two years to about $, and if you also believe from the evidence that the transactions upon which the plaintiffs' claim is founded consist of different transactions, beginning with a sale amounting to over $26,000, and the least of which is $6,600, and the greatest over $50,000, all occurring during about 2½ months, and all for future delivery, and amounting to over $251,000, I leave it for you to say whether such sudden change in the nature of the dealings was not sufficient to put plaintiffs on their guard, and to charge them with knowledge that such transactions were outside the proper partnership business of Irwin and Davis if such be the fact.

13. The law presumes that the business of a firm is to be transacted at the place where the firm is established and its place of business located.

Such being the presumption of law, it was the duty of plaintiffs to inform themselves whether any purchases of wheat ordered by the firm of Irwin and Davis were within the scope of the partnership business,
94 and plaintiffs are chargeable with notice whether or not such purchases were in fact within the scope of the firm business of Irwin and Davis.

14. If you believe from the evidence that plaintiffs were, in the month of July, 1877, and before any of the alleged losses had occurred which are stated in plaintiffs' complaint, ordered to buy for Irwin and Davis 10,000 bushels of wheat in Baltimore, and if you also believe from the evidence that such purchase was not actually within the scope of the partnership

business of Irwin and Davis as agreed between themselves by the partners of said firm, the fact that such purchase was made at so great a distance from the place where the firm is located, and was not within the partnership business in fact, would be sufficient to put plaintiffs on their guard, and to charge them with notice that the partner ordering such purchase was attempting to deal outside the scope of the partnership business, and any transactions thereafter made with such partner by plaintiffs would be at their own peril.

14 (*a*). The fact that the firm of Irwin and Davis shipped some 10,000 bushels of wheat and 11 car loads of corn to Williar and Son, as commission merchants, from April, 1875, to October, 1877, with orders to them to sell the same on the market and remit proceeds of sales, does not 95 raise or support any presumption that Irwin and Davis knew and understood the rules of an exclusive association of produce brokers and commission merchants of Baltimore known as the corn and flour exchange of Baltimore, nor do such shipments of actual produce for sale on arrival or on order after arrival at all charge them (I. and D.) with knowledge of such rules, or in any degree bind them by said rules and regulations of said exchange as to settlements between members of said exchange.

15. It has been stated that one of the defences in this case is that the transactions out of which the plaintiffs' claim grows were gambling transactions. If you believe from the evidence that such is the fact your verdict must be for the defendant.

16. It is insisted on behalf of plaintiffs that the transactions between themselves and the firm of Irwin and Davis were bona fide sales and purchases of actual property. It is insisted on behalf of the defendant that those transactions were betting, wagering, or gambling transactions, and as such void. This is a question of fact which you are to determine from all the evidence before you.

If you believe from the evidence that plaintiffs sold grain in Baltimore for future delivery professedly for the firm of Irwin and Davis, but not intending to receive the grain from Irwin and Davis, but intend- 96 ing to deliver it themselves, and actually delivering it and charging Irwin and Davis with any rise in price, and crediting Irwin and Davis with any fall in price, and if you further believe that it was the intention and understanding and agreement between plaintiffs and said Irwin and Davis that nothing more should be invested by said Irwin and Davis than an amount supposed to be sufficient to protect said plaintiffs from loss, I instruct you that such transactions were merely gambling contracts, and as such were void, and your verdict should be for defendant.

17. If you believe from the evidence that in the transactions between plaintiffs and Irwin and Davis it was not the intention of said Irwin and Davis to actually deliver or receive any of the property purporting to be sold or bought by them, but merely to bet or gamble upon the rise or fall of the price of property, and if you also believe from the evidence that such intention was known to plaintiffs, your verdict should be for defendant.

In determining what the intention of the parties was you should take into consideration the amount of property actually received or delivered by Irwin and Davis; whether they had the means to complete the trades they professed to make, to pay for what they professed to buy, and deliver what they professed to sell, and also the manner in which the accounts

97 are made out between plaintiffs and said Irwin and Davis, and the general manner in which the business was conducted.

18. In determining whether the transactions out of which plaintiffs' claim grows were bona fide or gambling transactions you will consider all the evidence regarding the dealings between Irwin and Davis and plaintiffs.

If you believe from the evidence that plaintiffs had in the years 1875 & 1876 a number of dealings with the firm of Irwin and Davis, in amounts not as much as $1,000 in any one transaction, and amounting during those two years to about $, and if you also believe from the evidence that the transactions upon which the plaintiffs' claim is founded consists of different transactions, beginning with a sale amounting to over $26,000, and the least of which is $6,600 and the greatest over $50,000, all occurring during about two and a half months, and all for future delivery, and amounting to over $251,000, I leave it for you to say whether such sudden change in the nature of the dealings was not sufficient to put plaintiffs on their guard and to charge them with knowledge that such transactions were intended as mere bets and wagers and not bona fide transactions.

19. If you believe from the evidence that the principal business of Irwin and Davis was in fact and by general reputation the running
98 of flouring-mills at Brazil, Indiana, buying wheat and corn, manufacturing it into flour and meal, and selling the product, and that as an incident to said principal business they took all such wheat and corn *and* was offered at their mill, shipping for immediate sale what they did not need for use; and if you further believe that the transactions upon which plaintiffs' claim is based consist of alleged dealings, beginning with an order for the sale of 20,000 bushels of wheat, amounting to over $26,000, the least of the order amounting to $6,600 and the greatest over $50,000, all occurring during about two and a half months, and all for future delivery, and amounting to over $251,000 in all, I leave it for you to say whether such transactions were not of a nature to put plaintiffs on their guard and to charge them with knowledge that such transactions were intended as mere bets and wagers. If they were, your verdict must be for defendant.

19 (*a*). If you believe from the evidence that in the latter part of July and in August, 1877, plaintiffs received orders to sell for Irwin and Davis 105,000 bushels of wheat, all to be delivered in the month of September, 1877, at Baltimore, the different orders varying in amount from 10,000 to 40,000 bushels each, I leave it to you to say whether that fact was not sufficient to put plaintiffs upon their guard, and to charge plaintiffs
99 with knowledge that the transactions were gambling transactions on the part of those ordering the sales, taking into consideration the place where said firm was located and the nature and amounts of their previous transactions.

20. The defendant, in addition to the defenses of which I have spoken, has in a counter-claim for the value of wheat actually shipped by Irwin and Davis to plaintiffs.

If you find for the defendant upon the ground that the transactions were gambling transactions, he is entitled to recover against the plaintiffs any balance there may be due from plaintiffs to the firm of Irwin and Davis upon the wheat actually shipped to plaintiffs by Irwin and Davis, if any such balance there be, with interest at 6 % from about the 1st of November, 1877.

McGREGOR AND COMPTON,
WILLIAMSON AND DAGGY,
McNUTT, McDONALD AND BUTLER,
For Def't.

21. If you find for the defendant on the ground that the transactions out of which plaintiffs' claim grows were outside the scope of the partnership business of the firm of Irwin and Davis, and if you also find that the wheat actually shipped by Irwin and Davis was shipped as a mere incident to the general milling business of Irwin and Davis, you should
100 allow the set-off and counter-claim against plaintiffs for the difference between the net amount of such actual shipments and the drafts drawn against the same.

If, however, you believe that such actual shipments were not made as an incident to the general milling business of Irwin and Davis, but merely for the purpose of putting margins into the hands of plaintiffs, you should not allow such counter-claim against plaintiffs.

WILLIAMSON AND DAGGY,
McGREGOR & COMPTON,
McNUTT, McDONALD AND BUTLER,
Att'ys for Def't.

And the court refused to give each of said instructions, to which refusal to give each of said instructions the defendant at the time excepted.

And thereupon the court, upon its own motion, gave to the jury each of the following instructions, to wit:

Charge of the court.

1. GENTLEMEN OF THE JURY: This is an action brought by the plaintiffs against the defendant, as surviving partner of the firm of Irwin and Davis, to recover an alleged balance due from said firm to the plaintiffs. The transactions out of which it is claimed this balance grew were cer-
101 tain sales of wheat for future delivery claimed to have been made by the plaintiffs as commission merchants, at Baltimore, for Irwin and Davis, on the order of this firm. The defenses are (1) that the alleged sales of wheat were not within the scope of the partnership business of Irwin and Davis; that they were the individual transactions of Davis with the plaintiffs; and (2) that said sales were wagering contracts and void.

2. Were the transactions out of which the alleged balance due to the plaintiffs within the scope of the partnership business of Irwin and Davis?

Irwin and Davis were partners in the purchase and manufacture of wheat into flour. To this extent the defendant Irwin admits there was a partnership. He testified that the partnership was limited to this, and that his partner, Davis, who managed and carried on the firm business, had no authority to buy and ship grain to Baltimore or elsewhere on the firm account.

The firm of Irwin and Davis was formed, Irwin says, as early as March, 1872, and it existed under the active management of Davis until his death, in October, 1877. It is not denied that during all this time Davis did buy and ship grain to some extent in the firm-name. Necessary conveniences existed in connection with the mill for the loading of grain into cars for shipment.

The letter and bill heads of the firm during all this time were, "Irwin
and Davis, millers and grain dealers, Brazil, Indiana," and Davis
102 regularly entered upon the books of the firm transactions in the
purchase and shipment of grain.

3. If you believe that the purchase and sale of grain was within the apparent scope of the partnership business, and that parties dealt with Irwin and Davis in good faith, believing they were dealing with the firm, then the firm became liable for such transactions.

4. If Irwin permitted Davis to hold himself and Irwin out to the world as partners in the business of dealing in grain, he became liable with Davis on contracts for the sale and purchase of grain for future delivery, and in that case it is not material that Irwin should have actual knowledge of particular sales or purchases in the firm-name; and if Irwin knew that Davis was holding the firm out as dealers in grain, and did not protest or give public notice to the contrary, he is responsible as partner for all contracts made by Davis in the firm-name, within the apparent scope of the business of dealing in grain. If Davis, as partner, did in fact buy and sell grain, and if in his correspondence with customers and others, including the plaintiffs, he employed printed letter-heads or cards representing the firm of Irwin and Davis, as grain dealers, this was a holding out of that firm as a partnership engaged in that business, and if before and at the
time of the dealings with the plaintiffs Irwin knew that the firm
103 was thus held out as grain dealers, he is liable as a partner. If,
therefore, you believe from the evidence that Irwin and Davis held
themselves out as dealers in grain as well as in flour, and that plaintiffs dealt with Davis, supposing they were dealing with the firm, and in so doing advanced their own money in fulfilling such contracts, you should find for the plaintiffs in whatever sum the evidence may show them to be entitled to on account of such advancements, unless you think the defendant has shown that the transactions between the plaintiffs and Irwin and Davis were gambling transactions.

5. If you find that the dealings with the plaintiffs were within the scope of the partnership, you will next consider whether the dealings were gambling transactions. The burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal, and the law does not, in the absence of proof, presume that parties are gambling.

A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an
actual transfer of property is contemplated. A transaction which
104 on its face is legitimate cannot be held void as a wagering contract
by showing that one party only so understood and meant it to be.
The proof must go further, and show that this understanding was mutual—that both parties so understood the transaction. If, however, at the

time of entering into a contract for the sale of personal property for future delivery it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager, and nothing more. It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade.

6. It is not sufficient for the defendant to prove that Irwin and Davis never understood that they were to deliver wheat in fulfillment of the sales made for them by the plaintiffs. The presumption is that the plaintiffs expected Irwin and Davis to execute their contracts, expected them to deliver the amount of grain sold, and before you can find that the sales were gambling transactions and void, you must find from the proof that the plaintiffs knew or had reason to believe that Irwin and Davis contemplated nothing but a wagering transaction, and acted for them accordingly.

105 If the plaintiffs made sales of wheat for Irwin and Davis for future delivery, understanding that these contracts would be filled by the delivery of grain at the time agreed upon, Irwin and Davis were liable to the plaintiffs, even though they meant to gamble, and nothing more.

7. The testimony tends to show that a general custom obtained among grain commission merchants in Baltimore to the following effect: When one commission merchant, upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and where it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase the same or a larger quantity of the same kind of grain for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then, in such case, the two commission merchants meet together and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts, and restoring any margins that may have been put up, and that from that time forth the first commission merchant holds for the benefit of the customer for whom he sold the order or contract of the purchaser for whom he bought, so that the wheat of the selling customer may, when
106 delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as guarantor to his customer.

The evidence further tends to show a custom obtaining among commission merchants at Baltimore to the further effect that though the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain, for like delivery, so that the seller owes the wheat to the buyer to whom he sold, and he to another who owes like wheat for like delivery to the first commission merchant, that then in such case they settle by what they call "a ring," that is, they all reciprocally surrender or cancel their contracts, adjust the price differences between themselves, and surrender all margins that had been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been canceled or surrendered, and that he guarantees to his customer the performance of the contract originally made on his behalf.

I say to you, gentlemen, that these customs are founded in commercial convenience; that they are not in contravention of the law, and that they
are valid.

107 In determining what the intention of the parties was in these
transactions you will carefully weigh all the evidence. Henry D. Williar, one of the plaintiffs, testifies that the plaintiffs expected Irwin and Davis to execute their contracts by delivering the amount of wheat sold. It seems that the plaintiffs sold for Irwin and Davis, for delivery in about two and a half months, 165,000 bushels of wheat. Did Irwin and Davis expect to deliver this amount of wheat within this time? Did the plaintiffs expect Irwin and Davis to enable the plaintiffs to deliver this amount of wheat within the time fixed for delivery? In this connection you will consider the previous dealings between Irwin and Davis and the plaintiffs, the ability of Irwin and Davis to engage in transactions of this magnitude, and the opportunity which the plaintiffs had had to know the extent and character of the business of Irwin and Davis, and their financial standing and ability, and the importance of Baltimore as a grain market.

To the giving of each of which instructions defendant at the time excepted.

To the first, because it states partially and incorrectly the nature of plaintiffs' claim, the transactions out of which it grew being purchases as well as sales of wheat.

To the second, because it states partially and incorrectly the facts, as there was no evidence tending to prove any shipments of grain earlier than
December, 1874, and a part of the letter-head of said firm only is
108 given as the whole thereof, and because said instruction does not
distinguish between the shipments of grain other than wheat and
wheat, whereas the evidence shows that no wheat was shipped until 1877.

To the third, because it imperfectly and incorrectly states the law in this, that it leaves entirely out of view the nature of the purchases and sales shown by the evidence, and in effect states that if the firm of Irwin and Davis dealt in grain to any extent, however small, for present delivery, and parties had knowledge of such dealings, the firm of Irwin and Davis would be liable on transactions for future delivery, no matter how large or in what market.

To the fourth, because it incorrectly states the law relative to the liability of defendant upon the facts therein assumed.

To the third and fourth, because they incorrectly state the law as to the scope of partnership and the liability of individual partners for dealings in the firm-name.

To the fifth, because it withdraws from the jury the consideration of the question whether the transactions shown by the evidence were or were not gambling transactions upon the face of the transactions, and instructs the jury that upon their face they are legal.

To the sixth, because it instructs the jury that the presumption is that
plaintiffs expected Irwin and Davis to deliver the amount of
109 grain sold, whereas it should have been left for the jury to deter-
mine whether it could be presumed that Irwin and Davis intended
to deliver such amount of grain as said Davis ordered sold on their behalf.

To the seventh, because it instructs that it is a valid sale of grain to cancel an outstanding purchase and hold the former order to purchase against the present order to sell, and that ring settlements by cancellation of contracts and adjustment of differences are valid as performance of contracts, and because it instructs in effect that Irwin and Davis are bound by the customs obtaining among Baltimore commission merchants.

To the eighth, because it calls attention to the importance of Baltimore as a grain market in determining the question whether Irwin and Davis expected to deliver the wheat sold, and wholly omits to call the attention of the jury to the importance of Brazil, Indiana, as a grain market as bearing on that question.

And thereupon the jury retired, and afterwards, to wit, on the 17th day of March, 1880, being the 116th judicial day of the November term, 1879, of said court, said jury returned into court the following verdict:

"We, the jury, find for the plaintiffs, and assess their damages at seventeen thousand six hundred and twenty-two dollars and seventy-eight cents.

"J. D. HUGHUDY, "*Foreman*."

110 And thereafter, to wit, on the 19th day of March, 1880, being the 118th judicial day of the November term, 1879, of said court, defendant filed his motion for new trial in said cause, in the words and figures following, to wit:

* * * * * * *

And afterwards, to wit, on the 26th day of March, 1880, being the 124th judicial day of the November term, 1879, of said court, the court, being sufficiently advised in the premises, overruled said motion for new trial and entered judgment on said verdict, and sixty days' time is given defendant to prepare and file his bill of exceptions to the rulings of the court in the admission and exclusion of evidence and the giving and refusal to give instructions to the jury, and containing such parts of the evidence as may relate to such exceptions.

And now, on this 18th day of May, 1880, being the 14th judicial day of the May term, 1880, and within the time so limited as aforesaid, said defendant tenders this his bill of exceptions, and prays that the same be signed and sealed by the court and made part of the record in this cause, which is done accordingly this 19th day of May, 1880, being the 15th judicial day of the May term, 1880, of said court.

WALTER Q. GRESHAM,
Dist. Judge.

111 Supreme Court of the United States.

JOHN W. IRWIN, PLAINTIFF IN ERROR,
vs.
GEORGE P. WILLIAR AND HENRY D. WILLIAR,
defendants in error.

Know all men by these presents that we, John W. Irwin, J. J. Vandergrift, C. N. Payne, Joseph Bushnell, and Robert Irwin, are held and firmly bound unto the above-named George P. Williar and Henry D.

Williar, partners under the firm name of George P. Williar and Son, in the sum of twenty-four thousand dollars, to be paid to said George P. Williar and Henry D. Williar, partners; to which payment well and truly to be made we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals and dated this 17th day of April, 1880.

112 Whereas the above-named John W. Irwin hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is that if the above-named John W. Irwin shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged or awarded against him if he shall fail to make good his plea, then this obligation to be void; otherwise in full force.

J. W. IRWIN. [SEAL.]
J. J. VANDERGRIFT. [SEAL.]
C. N. PAYNE. [SEAL.]
JOS. BUSHNELL. [SEAL.]
ROBERT IRWIN. [SEAL.]

Sealed and delivered in presence of Hugh C. Graham, as to J. J. Vandergrift, J. W. Irwin, C. N. Payne, and Jos. Bushnell.

Taken and approved by me this 2d day of July, 1880.

W. Q. GRESHAM.

UNITED STATES OF AMERICA,
Western District of Penn'a:

Before me, a United States commissioner in and for said western district of Penn'a, on the 17th day of April, A. D. 1880, *before me* came John W. Irwin, the principal on the above bond, and C. N. Payne, one of the sureties, and severally acknowledge the foregoing bond, as principal and surety, to be their act and deed.

Also, on the 3d day of May, A. D. 1880, personally came J. J. Vandergrift and Joseph Bushnell, two of the sureties on the foregoing bond, and acknowledged said bond, as sureties, to be their act and deed for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this 3d day of May, A. D. 1880.

[SEAL.] HUGH C. GRAHAM,
U. S. Commissioner.

112½ UNITED STATES OF AMERICA,
Western District of Penn'a:

Before me, a United States commissioner in and for the western district of Pennsylvania, personally came J. J. Vandergrift, of Oil City, Penn'a, and Joseph Bushnell, of Titusville, Penn'a, two of the sureties on the bond of John W. Irwin, plaintiff in error, to George P. Williar and others, defendants in error, who, being severally sworn according to law, doth depose and say that they are each worth in real and personal property situate in the State of Penn'a at least twenty-five thousand dollars over and above any indebtedness or encumbrances; and further saith not.

JOS. BUSHNELL.
J. J. VANDERGRIFT.

Sworn to and subscribed before me May 3d, 1880.
[SEAL.] HUGH C. GRAHAM,
U. S. Commissioner.

113 UNITED STATES OF AMERICA,
Western District of Penn'a:

Before me, an United States commissioner in and for the western district of Pennsylvania, personally came John W. Irwin, of Butler, Butler County, State of Pennsylvania, who, being duly sworn, deposes and says that he is the principal in the bond of John W. Irwin, plaintiff in error, to George P. Williar and others, defendants, accompanying this affidavit; that he is worth in real and personal property situate in the State of Pennsylvania at least twenty-five thousand dollars over and above any indebtedness or incumbrance.

J. W. IRWIN.

Sworn to and subscribed before me this sixth day of May, A. D. 1880.
[SEAL.] JAMES I. KAY,
U. S. Commissioner, Western District of Penn'a.

114 UNITED STATES OF AMERICA,
Western District of Penn'a:

Before me, a United States commissioner in and for said district, personally came C. N. Payne, of Titusville, Pa., and one of the sureties on the bond of John W. Irwin, plaintiffs in error, to George P. Williar and others, defendants in error, who, being duly sworn, says that he is worth in real and personal property in the State of Pennsylvania, over and above all indebtedness and incumbrances, twenty-five thousand dollars; and further saith not.

C. N. PAYNE.

Sworn to and subscribed before me this 17th day of April, 1880.
[SEAL.] HUGH C. GRAHAM,
U. S. Com'r.

115 THE STATE OF OHIO,
Portage County, ss:

Before me, deputy clerk of the court of common pleas within and for said county of Portage and State of Ohio, personally came Robert Irwin, aged sixty-six years, who, being duly sworn according to law, deposes and says that he is a resident of said county of Portage; that he is the owner in his own right of unencumbered real estate of the value of nine thousand dollars, also of personal property of the value of over one thousand dollars, and that he is the owner of property, real and personal, in excess of all indebtedness of the value of nine thousand dollars. All his indebtedness is less than five hundred dollars.

ROBERT IRWIN.

Sworn to before me and subscribed in my presence this 22d day of April, A. D. 1880.

[SEAL.] D. B. LAWRENCE,
Deputy Clerk of Courts, Portage County, Ohio.

116 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the seventh judicial circuit and district of Indiana, greeting:

Because on the records and proceedings, as also on the rendition of a judgment, in a plea which is in the said circuit court, before you, between John W. Irwin and George P. Williar and Henry D. Williar, a manifest error hath happened, to the great damage of the said John W. Irwin, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the eleventh day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this ninth day of September, A. D. 1880.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

(Indorsed:) Writ of error.

117 United States of America to George P. Williar and Henry D. Williar, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein John W. Irwin is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana, and ex officio judge of said circuit court, this 9th day of September, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] W. Q. GRESHAM.

118 SEPTEMBER 9TH, 1880.

We hereby acknowledge service of the within citation this ninth day of September, 1880.

BAKER, HORD & HENDRICKS,
Attorneys for George P. Williar, Henry D. Williar.

(Indorsed:) Citation.

119 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the case of George P. Williar and Henry D. Williar vs. John W. Irwin, as the same fully appears of record in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, on this 30th day of September, A. D. 1880.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

(Indorsement on cover:) No. 301. John W. Irwin, plaintiff in error, vs. George P. Williar and Henry D. Williar. Indiana C. C. U. S. Filed 4th October, 1880.

110-499

OCT 10 1893

IN THE

Supreme Court of the United States.

No 56.

JOHN W. IRWIN, Plaintiff in Error,
vs.
GEORGE P. WILLIAR and HENRY D. WILLIAR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR,

By JOHN M. BUTLER.

CARLON & HOLLENBECK, Printers.

United States Supreme Court

JOHN W. IRWIN,
v.
GEORGE P. WILLIAR
AND
HENRY D. WILLIAR.

No. 56.
OCTOBER TERM, 1883.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

The chief points involved in this case are:

1. The law defining the scope of partnership business, and whether the locality and physical surroundings of a firm do not in some degree measure the scope of the partnership business, and limit the power of one partner to bind an absent partner.
2. The law relating to the liability of an absent partner for losses incurred in speculative dealings and option contracts, entered into by his co-partner in the firm name with-

out his consent, on a Board of Exchange six hundred miles from the home and place of business of the firm, such speculations not being contemplated by the partnership contract, and not being necessary in carrying on the usual and ordinary business of the firm as known and recognized in the community in which the firm is located.

3. The law drawing the line between valid and void option contracts for the sale of commodities for future delivery, and defining the instructions that should be given by the court to the jury upon the questions of the intent of the parties, the burden of proof, and the presumptions of law arising from the mere form of the contract.

4. The validity and legality of what are known as "ring settlements," made by brokers being members of a Board of Trade, by which, before the expiration of the options given, they cancel and surrender contracts for future delivery made upon orders of their various customers, refund all margins, and pay differences between contract price and the price on the Board at the time of the surrender of the contracts, and charge the differences so paid to their customers.

5. Whether the custom or usage of a Board of Trade, the members of which only are permitted to contract with each other on 'Change for the purchase and sale of merchandise, can be introduced in evidence against, and be made binding upon, outside parties who are not proved to have had any knowledge of, or even to have ever heard of, such usage or custom.

6. The law touching the duty of courts in the matter of instructions to be given to juries.

7. Whether, when a case is transferred from a State court to the United States Circuit Court, where, under the law of the State, the entire case could be prosecuted and determined as a single case without division, the United States Circuit Court has the right to divide the case after the

transfer, making of it two cases, one at law and another in chancery, thereby admitting evidence against the defendant in the case at law which would not have been admissible under the State law if the case had not been divided.

STATEMENT OF CASE.

George P. Williar and Henry D. Williar, defendants in error herein, during and prior to the transactions involved in this action, were commission merchants and brokers engaged in the business of buying and selling corn and flour on account of their customers, under the firm name of George P. Williar & Son, at Baltimore, Md. They were members of the Corn and Flour Exchange of Baltimore, at and through the members of which substantially all the business of buying and selling grain at that city was done. The Corn and Flour Exchange of Baltimore was an association, the members of which only were permitted to contract with each other on 'Change for the purchase and sale of merchandise.

In the year 1872 John W. Irwin, plaintiff in error herein, and one George M. Davis, who were step-brothers, became the owners, as partners, of a flouring mill and appurtenances at Brazil, Clay county, Indiana. Their contract of partnership, pursuant to which they became owners of said property, contemplated the buying of grain and the manufacturing of it into flour and meal, and the disposal on the market of such grain as might accumulate in excess of what they required for manufacturing, and did not contemplate as between themselves the buying and selling of grain in large quantities for speculation. Irwin resided at Butler, Pennsylvania. Davis resided at Brazil, Indiana, and had entire management of the partnership business. Irwin visited Brazil at long intervals, but was not there for about two years next prior to October, 1877. For several years prior to the formation of said partnership, and afterwards up to the close of the same, the principal business conducted at said mill was generally recognized in the community of Brazil as that of merchant milling. Appurtenant to the mill was a warehouse for the storage of grain, equipped with appliances for the loading and unloading of grain in bulk into and from cars. The mill manufactured both flour and corn-meal. The average manufacture of flour was thirty barrels per day, requiring about one hundred and fifty bushels of wheat per day.

The working capital of the firm of Irwin & Davis varied from $2,000 to $4,000, and their daily payments for purchases of wheat varied from $300 to $800 in the summer months. The public advertisement of the business of the firm upon its business cards, letter-heads, etc., was as follows:

"Brazil Flouring Mills. Irwin & Davis, Millers and Dealers in Grain. Brazil, Indiana."

Irwin knew of this advertisement of the firm business.

Brazil is the county seat of Clay county, Indiana; is situated about midway between the cities of Terre Haute and Greencastle, and has a population of not more than 4,000 or 5,000. In 1877 there were as many as ten flouring mills in Clay county, Indiana, most of them being custom mills, while the entire wheat crop of the county for the same year was only 171,053 bushels. Clay county is surrounded by the counties of Vigo, Putnam, Parke and Owen, and wheat was brought to market at Brazil from some parts of each of these counties distant from their own market towns. But each of these counties had mills and wheat markets other than Brazil. Vigo county had Terre Haute for its market, a city many times the size of Brazil. Putnam county had the city of Greencastle for its market, a much larger place than Brazil. Parke county had Rockville, its county seat, fully as large a place as Brazil, for its market town, while Owen county had Spencer, its county seat, for its market town, all railroad towns, furnishing good market facilities. The wheat crop of Clay county, for the year 1877, was very much larger than usual, being 171,053 bushels, while in 1876 it was only 105,690 bushels.

The storage capacity of the firm of Irwin & Davis at their mill and warehouse adjoining the mill was not large, and, inasmuch as it was necessary for the firm to take what wheat was offered it in order to keep itself in repute as furnishing a home wheat market, which was essential so long as it carried on the business of merchant milling, it accumulated wheat in the months immediately succeeding the harvest of 1877 in excess of its storage capacity, and therefore shipped some surplus that year for sale on the eastern market. The firm very often had a surplus of corn above that required for manufacturing meal, and all along during the partnership more or less corn was shipped for sale, always in small consignments and only sold on immediate delivery. In manufacturing flour, bran and other residue accumulated, which was sold for feed. In connection with this feed stuff the firm also dealt in oats, but only in small quantities and chiefly for sale to home customers.

Soon after the formation of the partnership, Davis, in the firm name of Irwin & Davis, and as part of the firm business, began and continued to ship corn and oats to Indianapolis and corn and flour to Baltimore, for sale and immediate delivery, in consignments not exceeding one thousand dollars in value each. In the year 1875 divers such consignments of corn were made to Williar & Son, at Baltimore, for sale on account of said Irwin & Davis. While the evidence disclosed the fact that a large part of the flour manufactured by the firm was shipped to Baltimore for sale on immediate delivery, there was no evidence introduced tending to prove that either Davis or the firm of Irwin and Davis ever shipped a bushel of *wheat* to Baltimore or any other eastern market prior to the summer of 1877. No evidence was introduced tending to prove that Davis had, either in his own name or in the firm name of Irwin &

Davis, prior to the summer of 1877, ordered any purchase of wheat or of any kind of grain or merchandise in the Baltimore market, or in any eastern market either for present or future delivery. No evidence was introduced tending to prove that Davis had, either in his own name or in the firm name of Irwin & Davis, prior to the summer of 1877, ordered any sale of wheat or of any kind of grain or merchandise in the Baltimore market, or in any eastern market, either for present or future delivery, excepting only the small consignments of corn shipped to Baltimore, as hereinbefore stated, for sale and immediate delivery.

In 1876 Davis did speculate in wheat on the Chicago market and entered the speculative dealings upon the books of the firm of Irwin & Davis, but it was proved on the trial that these speculative dealings all occurred subsequent to the last visit of Irwin to Brazil, prior to the death of Davis, and that Irwin had no knowledge whatever of those dealings until after the close of the partnership.

In the spring of 1876 Williar & Son sent to the firm of Irwin & Davis a private *cipher book* for use in telegraphing. This book does not seem to have been needed or used in any correspondence regarding any of the actual shipments made by Davis in behalf of the firm of Irwin & Davis, but it was used extensively in correspondence regarding the transactions now to be stated. The bill of exceptions gives only the translation of the most of this telegraphic correspondence, but it gives two or three illustrations of the use of the cipher book. On July 12, 1877, Davis sent the following telegram to Williar & Son from Brazil:

"Cadet business fancy abstain at or over. Bravely lament. IRWIN & DAVIS."

Which, when translated, means, "Sell to arrive twenty thousand bushels No. 2 red winter wheat at or over one dollar and thirty-nine cents." This was the beginning of as wild a speculation as is often met with; too reckless and extravagant, and on too large a scale for actual shipments from the little town of Brazil to fill the contracts, ever to have been seriously contemplated by either party. Within the fifty-three days beginning July 12th and ending September 3rd, Davis ordered sales for futnre delivery, sellers' option, amounting in the aggregate to 165,000 bushels. The sales thus ordered were as follows:

July 12.	10,000	bushels, sellers' option first half	August.
" 12.	10,000	bushels, sellers' option	August.
" 16.	10,000	" " "	"
" 17.	10,000	" " "	Sept.
Aug. 14.	5,000	" " "	"
" 15.	10,000	" " "	"
" 17.	30,000	" " "	"
" 20.	40,000	" " "	"
" 20.	20,000	" " "	Oct.
" 27.	10,000	" " "	Sept.
Sept. 3.	10,000	" " "	Oct.

Making a total aggregate of 165,000 bushels. Of this vast amount of wheat, 30,000 bushels was to be delivered during August; 105,000 bushels during September, and 30,000 bushels during October. To have made actual delivery of wheat under these alleged contracts by purchase and shipment would have required the use by Davis of an actual cash capital of about $200,000. The idea that either Davis or Williar & Son ever contemplated, intended or expected that Davis would fill these contracts and make actual delivery of this amount of wheat by shipment from the flouring mills of Irwin & Davis is too absurd for serious consideration. It would have been utterly impossible for Davis to have filled the orders for the sale of the 30,000 bushels for August delivery by shipments from Brazil between July 12 and the expiration of his August options, even if he had stopped the mill and shipped to Williar & Son every grain of wheat that could be bought in the Brazil market. The filling of the comparatively small August sale would have required of Davis the purchase and shipment of over 800 bushels of wheat every day—Sundays excepted—from the day he gave the first order, while the bill of exceptions shows that average daily purchases of wheat by the firm of Irwin & Davis at Brazil, even in the months immediately succeeding wheat harvest, did not amount to anything like 800 bushels.

But the August orders are of slight consequence compared with the September deals. The orders of Davis call for the delivery of 105,000 bushels during September. This would require the delivery of *3,500* bushels every day during the month of September. 3,500 bushels every day would be nine car loads every day, and yet one of these defendants in error testified that Williar & Son expected Irwin & Davis to ship the wheat to them to fill all the orders, and the court, in instructing the jury, called special attention to this evidence as tending to prove good faith and an intention upon the part of Williar & Son to actually perform the contracts.

The language of the correspondence attending these alleged dealings has all the ear-marks of grain gambling, as for example:

"We advise you to cover." "Cover first half—August—when you think best." This was telegraphed by Davis on August 14. The alleged contract called for the delivery of 10,000 bushels by the middle of August, yet not a pound had been delivered up to August 14. Williar & Son knew the fact. On August 9 they had given the advice, "Advise you to cover," and yet they say that they did not intend or expect that these orders would be settled by the payment of differences. August 15, "Bought to cover first half Aug." August 18, "Bought in twenty August." September 1, "We think Sept. is largely oversold everywhere." September 3, "Are inclined to think there will be a *squeeze* here during

Sept." "The *longs* last month were very moderate in their demands, but they brag of pushing the *shorts* to the wall this month." "The market is about $8,000 against you. If there is any further advance we will have to call on you for *margins*; so to obviate this, you might let stuff come along without drafts until you have good margins with us." "We know September is largely oversold." September 7, "*No legitimate trading.*" "Present prices are purely speculative, and kept up by the bulls" September 25, "The long interest forced settlement to-day at $1.53, at which price we bought in your September to cover. We were actually forced into this, and had to make the very best settlement we could, and the longs said if we did not settle they would run the price up to $1.60 or $1.70, and they undoubtedly could have done it, as fully three times as much was sold as could possibly come in."

It was proved at the trial that Irwin & Davis did not consign or deliver to Williar & Son any of the wheat so contracted by said Williar & Son to be sold on their account, except one car load, but it was also proved that Davis, in the name of Irwin & Davis, had, during the months of July, August and September, consigned other wheat to Williar & Son as commission merchants, but which, pursuant to Davis' orders, was sold on its arrival, and not any of it, excepting one car load, applied upon the contracts of sale for future delivery.

Williar & Son do not claim or pretend that they ever actually bought or delivered any part of 125,000 bushels of the 165,000 bushels ordered sold by Davis in the firm name of Irwin & Davis, but cancelled and settled their alleged contracts by what they call "Ring Settlements," which are settlements of differences between the contract price and the then market price, there being no performance whatever of the contracts involved in the "Ring Settlements." These "Ring Settlements" were made *before* the options expired.

On Sept. 20th Williar & Son thus settled for 15,000 bushels of September wheat at $1.48 per bushel, and on Sept. 21st, as shown by their itemized account, filed as part of their declaration, they settled for 80,000 bushels of September wheat at $1.53 per bushel, while their telegram of Sept. 19th, to Irwin & Davis, shows conclusively that they might have settled on that day at $1.41½ per bushel. This difference of price between Sept. 19th and Sept. 20th to 25th forms the bulk of the judgment in this case. It should be remembered that this occurred *after* Williar & Son say in their correspondence that they knew that September wheat was "largely oversold," that there was "*no legitimate trading*," that "present prices were purely speculative," that "a squeeze" and a "corner" was in contemplation, and that the "longs" were bragging of their intention to push the "shorts" to the wall.

In full possession of all of this knowledge they quietly waited until prices went up from $1.41½ to $1.53 per bushel, and then went into the "Ring Settlement" and charged up against Irwin & Davis the enormous differences formed by the fictitious and speculative prices forced by the brokers who were running the anticipated "corner."

In this connection it should be remembered that on September 17th Davis telegraphed, "Close deal, using your best judgment," and again, on September 19, telegraphed, "Close deal as fast as you prudently can," and on September 22, "Yes; close all deals. Are not able to pay drafts."

Some evidence was introduced tending to show that Williar & Son performed some of the contracts of sale entered into by them on account of the orders given them by Davis in the firm name of Irwin & Davis, by delivering the wheat called for by the contracts to the purchasers, the total amount so purporting to have been actually delivered not exceeding 40,000 bushels. But this evidence was, to say the least of it, exceedingly unsatisfactory and by no means convincing.

The itemized account does not show a single dollar charged for storage or insurance, or any cost for receiving or handling any wheat. Some such charges would seem to be inevitable if 40,000 bushels of wheat or any other amount was actually received by Williar & Son, and delivered by them to other purchasers in fulfillment of their contracts. There was no evidence even tending to show that any warehouse receipts were received or delivered by Williar & Son in their pretended performance of contracts.

It was proved at the trial that, of the very first order sent by Davis, Williar & Son pretended to sell 5,000 bushels *to themselves*, and afterward pretended to buy in *from themselves*, 5,000 bushels to fill the contract, charging their full commissions for each transaction. This is one of the instances in which they claim actual performance of the contract and actual delivery, although not a grain of wheat ever changed ownership or possession by reason of the contract.

It was proved at the trial that Williar & Son, shortly after these alleged dealings by telegraphic orders began, caused an examination of the standing and pecuniary responsibility of both Irwin and Davis to be made through a mercantile agency and by personal inquiries among members of the Corn and Flour Exchange. This examination, taken in connection with their own knowledge, derived from prior dealings with the firm of Irwin & Davis, undoubtedly and inevitably informed Williar & Son that Irwin lived in Pennsylvania, and that the bulk of his property was in that State; that the chief business of the firm of Irwin & Davis was merchant milling, and that the usual and ordinary business of the firm was comparatively small and limited. It was also proved that on August 31, 1877, George P. Williar, the senior member of the firm of Williar & Son, came to Brazil and had an interview with Davis at the railroad station. The mill of Irwin & Davis is near by and in sight of the station.

On September 17th, Williar & Son wrote to Irwin & Davis: "We beg to-day to inclose seven drafts, $2,500 *margins*. Please honor." Davis did not pay these drafts. On September 22, Williar & Son telegraphed Irwin & Davis: "Please remit, or ship if can't pay drafts. We have to put up margin here." And on September 25, they telegraphed Irwin & Davis: "Settlements September forced to-day at fifty-three. Bought yours in," while the itemized account of Williar & Son, filed as part of their declaration, shows that the "Ring Settlement" of September wheat took place on September 21st, and that on *that day* all of the Davis orders or contracts for September were closed out by the "Ring settlement."

It was proved at the trial that all the correspondence in regard to these transactions was in one handwriting, and that Davis was the person who conducted the correspondence, and wrote all letters and telegrams relating thereto.

On October 2, 1877, Davis wrote to Irwin the following letter:

"BRAZIL, IND., October 2, 1877.

"BROTHER WILL: You can do no good by coming here now. I have been taken in and done for by a lot of grain gamblers. The attorney, Mr. Compton, says you can not be held liable for what I have done outside of milling business; but if you come here they will get service on you, and give you trouble. I propose to stand the fight and acknowledge the whole gambling game, as it will prevent my ever going into that business again. Will try to send you some money on house next week.

"Yours,

"GEO. M. D."

On October 10, 1877, Williar & Son closed up their account against Irwin & Davis. On October 15, just five days after the account was closed, they commenced this action against Irwin & Davis in the circuit court of Clay county, Indiana.

On October 24, 1877, George M. Davis, crushed by the disastrous results of his conduct, hanged himself.

It was proved at the trial that the first actual knowledge which defendant Irwin had of these transactions between said Davis, claiming to act for the firm of Irwin & Davis, and Williar & Son, was in October, 1877, and after all said transactions had been finished. Immediately upon being informed of these transactions Irwin repudiated them as being entirely outside of the partnership business, and denied any responsibility of the firm of Irwin & Davis upon or by reason of said transactions.

Ater the suicide of Davis, Williar & Son caused the suit to be transferred from Clay Circuit Court to the United States Circuit Court for the district of Indiana. After the suit was transferred to the federal court the court, on motion of Williar & Son, divided the suit, and permitted Williar & Son to prosecute this suit as a suit at law against John W. Irwin alone, as surviving partner, and permitted Williar & Son to file a bill in chancery for the same causes of action against the administrator of Davis, the deceased partner of the firm of Irwin & Davis. By this division of the suit Williar & Son were enabled to introduce themselves as witnesses against this appellant Irwin, whereas by the statute of Indiana they could not have testified in their own behalf if the admistrator of Davis had remained a party to the action.

The action against Irwin alone was tried before the district judge and a jury, and resulted in the judgment from which this writ of error is prosecuted.

We believe all the material facts mentioned in this statement are substantiated by the bill of exceptions appearing in the record. The points to be discussed arise upon instructions given and refused by the court; the admission of evidence proving the customs and usages of the Corn and Flour Exchange of Baltimore, in the absence of any evidence that Davis, or the firm of Irwin & Davis, had any knowledge of such customs and usages; the rejection of the letter of Davis to Irwin of October 2, 1877, and the order of the court dividing the suit into two actions after the transfer from the State court.

ARGUMENT.

Two defenses were made by Irwin, viz.:

1. That these were in fact gambling transactions.
2. That these transactions were outside of the scope of the partnership business; that they were made by Davis in the name of the firm of Irwin & Davis, without the knowledge or consent of Irwin; that they were never ratified by Irwin, and were not binding upon the firm.

Following the order of the instructions of the court, the questions relative to this second defense will be first presented. The instructions given and refused by the court raise the questions of law which we wish to present. The issue joined upon this second defense, and the fact proved under that issue, certainly called for clear and definite instructions by the court upon the following points:

1. The law defining the scope of partnership business, and how such scope is to be ascertained; whether the locality and physical surroundings of a firm, and the nature and extent of its usual and ordinary business, as understood by the community in which it is established and carries on its business, do not measure the scope of the partnership business, and limit the power of one partner to bind an absent partner.
2. The law touching the liability of an absent partner for losses incurred in speculative dealings, entered into by his co-partner in the firm name, without his knowledge or consent, on a Board of Exchange six hundred miles from

the home and place of business of the firm, such speculations not being contemplated by the partnership contract, and not being *necessary* in carrying on the usual and ordinary business of the firm, as known and recognized in the neighborhood in which the firm is located.

Before discussing the instructions applicable to these points, as given and refused by the court, we submit the following as a summary of the law upon these points:

The act of one partner, in order to bind the firm of which he is a member, must be an act NECESSARY *for the carrying on of the business of the firm in the ordinary and usual way, that is, in the way in which that business is ordinarily and usually carried on by other people in that locality.*

The scope of the partnership business of a firm is measured and ascertained by the public notice given of the object of the copartnership, the declared and habitual business carried on, the LOCALITY *in which the firm has its domicile and place of business, the store, shop, mill, manufactory or building in which the firm carries on its business, the facilities possessed by the firm for carrying on its declared and habitual business, the sign upon the firm's business house, the printed business cards and letter-heads used by the firm, and such like usual indicia.*

The general understanding of the business community in which the firm is located and carries on its business, as to the nature and extent of the partnership business, is also a fact to be considered in determining the scope of the partnership business.

One partner can not bind an absent partner by any act outside of the scope of the partnership business, or beyond what is necessary for carrying on the business of the firm under ordinary circumstances, in the usual and ordinary manner, and within the scope of the partnership business as ascertained by the rules above given.

Every one attempting to deal with a firm through one of its partners is bound to know, and is bound by, the general scope of the partnership business.

> Lindley on Partnership, 4 Ed. (Ewell), 1881, vol. 1, *pp. 236–239 and notes.
> *Livingston* v. *Roosevelt*, 4 Johns. N. Y. 277.
> *Rogers* v. *Batchelor*, 12 Pet. 230–232
> *Guillon* v. *Peterson*, 9 Phila. (Pa.), 225.
> *Chandler* v. *Sherman*, 16 Fla. 99.
> *Venable & Co.* v. *Leorick, Brother & Co.*, 39 Tenn. 352.
> *Phœnix Iron Co.* v. *Samuel*, S. C. Penn. Jan. 29, 1883, The Reporter, vol. 15, p. 731.
> *Bentley* v. *White*, 3 B. Monroe, 263.
> *U. S. Bank* v. *Binney*, 5 Mason, 177.
> *Myrick* v. *Mich. Cent. R. R. Co.*, 9 Bissell, 44.

As to the attempt to bind an absent partner by entries upon the partnership books of account, we understand the law to be that:

"*Entries on partnership books are not evidence against the absent partner, and do not bind a partner with no knowledge of the fact that such entries are made, unless he consents to, and sanctions them, after full knowledge of the fact that such entries are on the books.*"

> *Piano Co.* v. *Bernard*, 2 Lea. (Tenn.) 364.
> *Hunt & Co.* v. *Benson*, 2 Humph. (Tenn.) 462.
> *U. S. Bank* v. *Binney*, 5 Mason, 188.

One other proposition of law may also, in one view of the evidence in this case, be pertinent and applicable; it is this:

"*Transactions of a partner, clearly in violation of his duty to the firm, will not bind the firm when the other party to the transactions is cognizant of, or co-operates in, such breach of duty.*

> Story on Agency, § 125.

If these propositions correctly state the law, we think it will appear that the court committed error in the instructions given, and in refusing to give instructions asked by Irwin. The only instructions given by the court pertaining to the defense, that these instructions were not within the scope of the partnership business, and were, therefore, not binding upon Irwin, having been made without his knowledge and consent, and never having been ratified by him, are as follows:

1. "Gentlemen of the jury: This is an action brought by the plaintiffs against the defendant, as surviving partner of the firm of Irwin & Davis, to recover an alleged balance due from said firm to the plaintiffs. The transactions out of which it is claimed this balance grew were certain sales of wheat for future delivery claimed to have been made by the plaintiffs as commission merchants, at Baltimore, for Irwin & Davis, on the order of this firm. The defenses are, (1), that the alleged sales of wheat were not within the scope of the partnership business of Irwin & Davis; that they were the individual transactions of Davis with the plaintiffs; and (2), that said sales were wagering contracts and void.

"2. Were the transactions out of which the alleged balance due to the plaintiffs within the scope of the partnership business of Irwin & Davis?

"Irwin and Davis were partners in the purchase and manufacture of wheat into flour. To this extent the defendant, Irwin, admits there was a partnership. He testified that the partnership was limited to this, and that his partner, Davis, who managed and carried on the firm business, had no authority to buy and ship grain to Baltimore or elsewhere on the firm account.

"The firm of Irwin & Davis was formed, Irwin says, as early as March, 1872, and it existed under the active management of Davis until his death, in October, 1877. It is not denied that during all this time Davis did buy and ship grain to some extent in the firm name. Necessary conveniences existed in connection with the mill for the loading of grain into cars for shipment.

"The letter and bill heads of the firm during all this time were, 'Irwin & Davis, millers and grain dealers, Brazil, Indiana,' and Davis regularly entered upon the books of the firm transactions in the purchase and shipment of grain.

"3. If you believe that the purchase and sale of grain was within the apparent scope of the partnership business, and that parties dealt with Irwin & Davis in good faith, believing they were dealing with the firm, then the firm became liable for such transactions.

"4. If Irwin permitted Davis to hold himself and Irwin out to the world as partners in the business of dealing in grain, he became liable with Davis on contracts for the sale and purchase of grain for future delivery, and in that case it is not material that Irwin should have actual knowledge of particular sales or purchases in the firm name; and if Irwin knew that Davis was holding the firm out as dealers in grain, and did not protest or give public notice to the contrary, he is responsible as partner for all contracts made by Davis in the firm name, within the apparent scope of the business of dealing in grain. If Davis, as partner, did in fact buy and sell grain, and if in his correspondence with customers and others, including the plaintiffs, he employed printed letter heads or cards representing the firm of Irwin & Davis as grain dealers, this was a holding out of that firm as a partnership engaged in that business, and if before and at the time of the dealings with the plaintiffs Irwin knew that the firm was thus held out as grain dealers he is liable as a partner. If, therefore, you believe from the evidence that Irwin & Davis held themselves out as dealers in grain as well as in flour, and that plaintiffs dealt with Davis, supposing they were dealing with the firm, and in so doing advanced their own money in fulfilling such contracts, you should find for the plaintiffs in whatever sum the evidence may show them to be entitled to on account of such advancements, unless you think the defendant has shown that the transactions between the plaintiffs and Irwin & Davis were gambling transactions." Rec. pp. 44 and 45.

We object to these instructions both on account of what they do contain, and on account of what they do not contain.

1. The first instruction bases the entire action and claim of Williar & Son upon "certain *sales* of wheat for future delivery." This is surely an erroneous description of Williar & Son's claim. The declaration, itemized account filed as part of the declaration, and all the evidence in the case, show beyond cavil that the claim of Williar & Son is based just as much upon alleged *purchases* of wheat *in Baltimore*, as it is upon alleged sales of wheat for future delivery at Baltimore.

One element in this defense of Irwin was to prove that these entire transactions of Davis, in the firm name of Irwin & Davis, were clearly and plainly *speculations in wheat on the Baltimore market*, a long distance away from the home of the firm, and distinct from its usual and ordinary business. Small sales of surplus wheat that exceeded the storage capacity of the "Brazil Flouring Mills," to be delivered at Baltimore, might be held to be within the scope of the partnership business, while the showing that the claim of Williar & Son rested upon alleged purchases at Baltimore, as well as upon alleged sales, of immense quantities of wheat, would put an entirely different aspect upon the entire transactions, and show them to have been clear outside of the co-partnership business. This error becomes the more hurtful to Irwin because it is followed up and emphasized in the next instruction as given by the court. For example, in the second instruction it is said: "It is not denied that during all this time Davis did buy and ship grain to some extent in the firm name. Necessary conveniences existed in connection with the mill for the loading of grain into cars for shipment." These sentences again base the case wholly upon alleged sales of wheat, and go very far toward absolutely withdrawing from the jury all consideration of any evidence proving alleged purchases of wheat at Baltimore. By these statements, and by omitting entirely any mention of alleged purchases of wheat at Baltimore, these transactions are shorn of the *speculative* and *fictitious* character stamped upon them by the evidence, and are made to look like ordinary transactions, in the regular conduct of the business of the firm of Irwin & Davis. This was not fair to Irwin. It was his right to have the jury authoritatively informed by the court that the claim of Williar & Son is based upon, and grows out of alleged *sales and purchases of wheat on the Baltimore market.* It would then have been left for the jury to say whether the *purchase and sale* of 165,000 bushels of wheat on the Baltimore market within less than three months, in transactions ranging from 5,000 to 40,000 bushels at a single deal, fairly comes within the scope of the business of a co-partnership in merchant milling, at the little town of Brazil, Indiana. This clause of the first instruction, as given, is a partial and erroneous statement of the foundation of the action, calculated to mislead the jury, and to withdraw their minds from the speculative character of the transactions involved in, and the basis of, Williar & Son's action.

2. We object to the second instruction given by the court, because it states partially and incorrectly the facts. Attention has already been called to this sentence, namely, "It is not denied that during all this time Davis did buy and ship grain to some extent in the firm name," as emphasizing

the misstatement of the claim of Williar & Son in this action. We wish now to show that it is unfair to Irwin in other respects.

It was unfair to use the word "grain" as used in this sentence. As here used the jury, and every one hearing or reading it, would naturally understand the word as meaning, and intended to cover, *wheat.* With that meaning the sentence mis-states the facts. There was evidence that surplus *corn* was occasionally shipped from the mill, the earliest shipment being in December, 1874, but there was no evidence even tending to prove that a single grain of *wheat* was ever shipped from the mill prior to July, 1877. This action was for alleged transactions in *wheat.* Was it fair to Irwin for the court to say: "It is not denied that during all this time Davis did buy and ship *grain* to some extent in the firm name?"

Taken in the connection in which it is used, this sentence could have but one effect upon the minds of the jury, namely, to cause them to understand and believe that Irwin did not deny, but admitted *that shipping wheat for sale was a part of the regular and ordinary business of the firm,* while nothing could be farther from the facts proved than just such an admission. The bill of exceptions shows no statement of evidence tending to support this statement of the instruction, if the word "grain" includes *wheat.* Rec. pp. 28–29.

Prominence is also given to the fact that "Necessary conveniences existed in connection with the mill for the loading of grain into cars for shipment," without stating that there were also facilities for *unloading* wheat and corn from cars, and without stating the fact, abundantly proved, that these facilities were incident to, and necessary for, the carrying on of the business of the firm of Irwin & Davis—merchant milling. The evident effect of the sentence was to convey to the jury the impression that shipping *wheat* was a part of the regular business of the firm of Irwin &

Davis. The evidence did not warrant, but, on the contrary, abundantly negatived any such inference or impression.

In this same instruction, the court proceeds to say:

"The letter and bill-heads of the firm during all this time were 'Irwin & Davis, millers and grain dealers, Brazil, Indiana.'"

In this sentence the most important words of the letter-head, the words most prominently advertising the chief and general business of the firm, are entirely omitted. The bill of exceptions shows the advertisement of the firm business, on the cards and letter-heads, to have been as follows:

"BRAZIL FLOURING MILLS. IRWIN & DAVIS, MILLERS AND DEALERS IN GRAIN, BRAZIL, INDIANA." Rec. p. 28.

This important omission of the words "Brazil Flouring Mills" from the instruction could have but one effect, and that is, to give undue prominence to the use of the words "Dealers in Grain." This letter-head, correctly given, means, and would instantly be understood by any business community to mean, no more or no less than if it had read, "Brazil Flouring Mills, Irwin & Davis, Merchant Millers," for there can be no merchant milling without dealing in grain for manufacturing, and yet, upon the strength of this letter-head, and upon that alone—for the knowledge by Irwin of the use of that letter-head was the sole and only proof that Irwin ever "permitted Davis to hold himself and Irwin out to the world as partners in the business of dealing in grain"—the court in effect charged the jury that Irwin and Davis were partners in any transaction that Davis might enter into in buying and selling wheat *in any market in the world, and in any amount* that his fancy might dictate. We can not believe that is law.

Again, in this same second instruction, the court says:

"And Davis regularly entered upon the books of the firm transactions in the purchase and shipment of grain."

The natural inference to be drawn by the jury from these words would be that these Baltimore speculative dealings were all regularly entered in the books as part of the firm business, while the facts proved were that the speculations in Baltimore were never entered in the books of the firm at all. The thirty-one car-loads of wheat shipped to Williar & Son in July, August and September, 1877, and the wheat shipped to Toledo, New York and Indianapolis, in the same months, was entered on the books; but none of the alleged sales and purchases at Baltimore, upon which this action is founded, were ever entered upon the books of the firm. But even if they were all entered it has already been shown that entries made by one partner on the firm books do not bind an absent partner who has no knowledge of them, and never consents to nor ratifies them.

3. We object to the third instruction because it fails to give to the jury any rules by which to ascertain what was in fact the "apparent scope of the partnership business." The whole instruction reads as follows:

"If you believe that the purchase and sale of grain was within the apparent scope of the partnership business, and that parties dealt with Irwin and Davis in good faith, believing that they were dealing with the firm, then the firm became liable for such transactions."

By what rules were the jury to be guided in seeking to determine the "apparent scope of the partnership business"? None whatever are given in this instruction. Two points are mentioned in the second instruction, namely: That "Davis did buy and ship grain to some extent in the firm name"; and a *part* of the "letter and bill heads of the firm," and that is all. Do those two statements, even if they had been correctly made, furnish all the law that the jury should have had in helping them to ascertain the "apparent scope of the partnership business"? To whom and where must the scope be apparent? No rules are given by which the jury might weigh and consider the mass of evidence introduced bearing upon this very question of the partnership business. On this point more will be said in another connection. We now only call attention to the fact that this instruction utterly failed to give the jury any legal rules by which to determine, under the facts proved, what the scope of the partnership business of the firm of Irwin & Davis was.

But passing that point for the present. Is the statement of this instruction correct as a proposition of law? Might not the purchase and sale of grain by a firm at Brazil, Indiana, be fairly and legitimately within the scope of the partnership business, then and *there*, and yet one member of that firm not be liable for the acts of his partner, in the name of the firm, in immense purchases and sales of grain in Baltimore for speculation?

Suppose A and B enter into partnership in Brazil, Indiana. They invest a capital of from $2,000 to $4,000. They own and occupy a storehouse suitable for carrying on a business that would employ the amount of capital named. They put upon their sign "A and B, Grocers and Dealers in Provisions." They print upon their letter and bill-heads, "A and B, Grocers and Dealers in Provisions, Brazil, Indiana." They are understood in the community as carrying on the business of buying and selling groceries and provisions in such amounts as would comport with their locality, their surroundings, their facilities and their capital. Is it the law that A, in the absence of B, and without his knowledge or consent, could sell on the Chicago market by telegraph for future delivery 10,000 tierces of lard, 10,000 tons of bacon, 10,000 dozen of eggs, and 10,000 barrels of mess pork, or that he could buy on the Chicago market like articles in like amount for speculation, or that he could enter into dealings on the New York market in sugar and coffee by the cargo, and bind his absent partner by such speculative dealings? The statement of the proposition is sufficient to prove its absurdity.

The law is founded in reason, and is never absurd when correctly interpreted. The trouble with this instruction, and, in fact, with all the instructions given by the court on this point is, that the nature of the alleged purchases and sales shown by the evidence is omitted from view, and the nature, locality, surroundings, facilities, capital employed, usual and ordinary business, and general reputation of the firm of Irwin & Davis, *at Brazil, Indiana*, are left entirely out of sight. It takes a full, fair view of all of these to determine what the scope of the partnership business was, and whether these immense speculations can reasonably be said to come within the scope of the partnership business.

This third instruction, in effect, states that if the firm of Irwin & Davis dealt in grain to any extent, however small, for present delivery, and parties had knowledge of such dealings, the firm of Irwin & Davis would be liable on transactions of purchase and sale of grain for future delivery, no matter how large or in what market. This is not the law as we understand the text-books and adjudged cases already cited.

4. We object to the fourth instruction given—

First. Because it again bases an important charge upon the determination of the "apparent scope of partnership business," without giving the jury any rules or directions by which to ascertain what that apparent scope really was.

Second. Because it binds Irwin by any and all speculations in grain that might be entered into by Davis in any market of the world, and for any conceivable amounts, simply because Irwin knew that a letter-head was being used by Davis bearing these words upon it:

"Brazil Flouring Mills. Irwin & Davis, Millers and Dealers in Grain, Brazil, Indiana."

This instruction squarely withdraws from the jury all evidence introduced tending to prove what the scope of the partnership business was. It makes it wholly unnecessary for the jury to look into that question. In this instruction the court says:

"If Davis, as partner, did in fact buy and sell grain, and if in his correspondence with customers and others, including the plaintiffs, he employed printed letter-heads or cards representing the firm of Irwin & Davis as grain dealers, this was a holding out of that firm as a partnership engaged in that business, and if before and at the time of the dealings with the plaintiffs Irwin knew that the firm was thus held out as grain dealers, he is liable as a partner. If, therefore, you believe from the evidence that Irwin and Davis held themselves out as dealers in grain as well as in flour, and that plaintiffs dealt with Davis, supposing they were dealing with the firm, and in so doing advanced their own money in fulfilling such contracts, you should find for the plaintiffs"

These words withdraw the whole question of the scope of the partnership business from the jury. The court here tells the jury that this letter-head made the scope of the partnership business of Irwin & Davis as wide as the world as to *place*, and as vast as the grain crops of the world as to *amount*. The scope of the partnership business of the firm of Irwin & Davis was a disputed fact in issue in this action. This court has held that it is error to withdraw from the jury the determination of a disputed fact in issue.

Manchester v. *Ericsson*, 105 U. S., 15 Otto, 347.

This instruction virtually withdraws that disputed fact from the jury. The court, after admitting a mass of evidence tending to prove the apparent scope of the partnership business, not only fails to give the jury any legal rules by which to apply this evidence to the issue made, but tells the jury that three facts bind Irwin by any and all possible dealings, or speculations in grain, that Davis might enter into in the firm name, no matter *where* or in *what amounts* such speculations might involve the firm. The three facts are:

1st. That "Davis, as partner, did in fact buy and sell grain."

2d. That "he employed printed letter-heads or cards representing the firm of Irwin & Davis as grain dealers."

3d. "That Irwin knew that the firm was thus held out as grain dealers"

According to this instruction these three facts bind Irwin absolutely by all transactions in grain entered into by Davis in the firm name, utterly regardless of any and all facts that were proved touching the scope of the partnership business of the firm of Irwin & Davis. If this is the law, partnership is the most dangerous ship that ever weighed anchor.

5. We object to these four instructions, they being all the instructions given by the court relative to this defense of Irwin, as a whole.

First. Because they assume the existence of facts of which there is no evidence, and make partial and erroneous statements regarding facts proved. The particular instances of these errors have been pointed out. This court has held that an instruction which assumes the existence of facts of which there is no evidence is misleading and erroneous.

Hopt v. *People*, 104 U. S., 14 Otto, 631.

It is certainly equally erroneous for an instruction to convey partial, incomplete and erroneous statements regarding material facts proved.

Second. Because, both as a whole and in detail, these instructions are unfair to Irwin in this: That all the material facts proved, that might tend against Irwin, are stated by the court, and made prominent in the instructions, while not a single one of the many material facts, abundantly proved in favor of Irwin, is even mentioned or alluded to in any of these instructions.

We do not think any one can, with a knowledge of the facts actually proved, read over these four instructions without being impressed with the correctness of this objection.

The duty of courts in giving instructions to juries is well defined. The leading propositions of law on this subject, as applicable to the case under consideration, are as follows:

It is error for the court to give any instruction which shall take from the jury the right of weighing the evidence on any disputed issue in the case and determining what effect it shall have.

Greenlief v. *Birth*, 9 Peters, 292.

It is error for the court, in instructing the jury, to misstate or incorrectly state the issues in the case.

Hall et al. v. *Weare*, 92 U. S.—2 Otto, 731.

Where there is evidence introduced on a point in issue in the case, it is the duty of the court to give the jury instructions as to the law applicable to such evidence.

The Chesapeake and Ohio Canal Co. v. *Knapp et al.*, 9 Peters, 541.

Instructions should be predicated upon the whole evidence in the case, and should enable the jury to weigh, consider and apply all the evidence.

It is error to give to the jury instructions which single out and give undue prominence to a portion of the evidence. If the instructions of the court direct the attention of the jury *only* to facts favorable to one party, leaving out of view all facts that tend to support the theory of the case favorable to the other party, such instructions are erroneous. Such instructions have a tendency to restrict the consideration of the jury to isolated facts to the exclusion of other facts proved.

Callaghan v. *Myers*, 89 Ill. 566.
Martin v. *Johnson*, 89 Ill. 537.
Evans v. *George*, 80 Ill. 51.

Frame v. *Badger*, 79 Ill. 441.
Ogden v. *Kirby*, 79 Ill 555
Chesney v. *Meadows*, 90 Ill. 430.
Moore v. *Wright*, 90 Ill. 470.
Graves v. *Colwell*, 90 Ill. 612
Campbell v. *Allen*, 38 Mo. 213.
Fine v. *The Board etc.*, 39 Mo. 59.
Gallagher v. *Williamson*, 23 Cal. 331
Larue v. *Russell*, 26 Ind. 386.
Barker v. *The State*, 48 Ind. 163.

Third: Because these instructions wholly fail to give the jury any rules of law by which to ascertain and determine from the evidence introduced, the scope of the partnership business of the firm of Irwin & Davis. No rules are given by which to apply this evidence to the issue joined, on the contrary, the entire evidence in behalf of Irwin on this issue is left out of view, and the consideration of it is virtually withdrawn from the jury.

If ever a case called for a careful, clear and complete statement of the law defining the scope of partnership business, and the liability of one partner for the acts of another partner, and applying the law to the facts proved, this was just that case. Yet we look in vain through these instructions for any such statement of the law, or application thereof to the facts of the case proved and in dispute. We have already, *supra*, stated the principles of law applicable to this issue, as gleaned from the best approved text writers and leading adjudged cases.

In *Livingston* v. *Roosevelt*, 4 Johns. 278, which has long been recognized as the leading case on this subject, and which has been fully approved by the decision of this court, Chief Justice Kent says:

"Public notice of the object of a co-partnership, the declared and habitual business carried on, the store, the counting-house, the sign, etc., are the usual and regular *indicia* by which the nature and extent of a partnership are to be ascertained. When the business of a partnership is thus defined and publicly declared, and the company do not depart from that particular business, nor appear to the world in any other light than the one thus exhibited, one of the partners can not make a valid partnership engagement on any other than a partnership account. There must be some authority, beyond the mere circumstance of partnership, to make such a contract binding. Were it otherwise, it would be idle, and worse than idle, to talk of limited partnerships, in any matter or concern whatever, and the law would be recognizing an association, only to render it a most dangerous illusion to those whom it embraced."

In *Phœnix Iron Co.* v. *Samuel, supra*, the Supreme Court of Pennsylvania, and in *Myrick* v. *Michigan Central R. R. Co.*, Blodgett, J., decide that locality, surrounding circumstances, and the common understanding of the immediate business community, are all to be inquired into and considered in interpreting contracts and determining their extent, and the intention of the parties thereto.

In the light of these and other authorities already cited, let us look again at these instructions.

The LOCALITY and *physical surroundings* of a firm have something to do in defining and determining the scope of the partnership business. What did the words "Brazil Flouring Mills, Irwin & Davis, Millers and Dealers in Grain, Brazil, Indiana," on the letter-head, legally mean to Williar & Son? They meant that the domicile and place of business of the firm of Irwin & Davis was the little town of Brazil, Indiana. They meant that Irwin & Davis were partners in merchant milling *at Brazil. They meant that Irwin & Davis were dealers in grain in connection with their merchant milling at Brazil, Indiana.* Their mill and facilities, their physical surroundings, the size and location of Brazil, Indiana, their habitual and ordinary business *at*

Brazil, the volume of their business as it was manifested *at Brazil*, the capital requisite to carry on such a business as their habitual and recognized firm business *at Brazil* was, the size and the aggregate amount of the prior shipments of the firm *from Brazil*, the prior dealings of Williar & Son with Irwin & Davis, and the common understanding of the community *at Brazil* as to the nature and extent of the partnership business—all these were as much a part of the "*holding out*" as was the letter-head. The law says that these, and like facts and circumstances, limit and determine the scope of the partnership business, and that one partner can not bind the firm or an absent partner by any transactions outside of the scope of the partnership business thus limited and determined. Proof was introduced on all of these points. The bill of exceptions so shows. Yet not a rule of law is given to the jury applicable to this evidence or any part of it. In fact the existence of the evidence is ignored by the court. Can this be fair to Irwin? Is it legal? This matter of LOCALITY has very much to do in defining the scope of partnership business to outsiders and those intending to deal with the firm through one of its members.

Suppose C. & D., at some little cross-roads village in Indiana, form a partnership as blacksmiths. They build a shop, with ware-room attached, large enough to furnish facilities for doing such a volume of business as would ordinarily and naturally be done *at such a place* and amid such surroundings. They put up a sign, "C. & D., Blacksmiths and Dealers in Iron." They print a business card and letter-head, "C. & D., Blacksmiths and Dealers in Iron, Cross-Roads, Indiana." For years they carry on a small business comporting with their surroundings, with the wants of the neighbohood, and with the general understanding of the community in which the firm is located. They occasionally have small dealings with New York iron dealers and use their letter-heads in the business correspondence. Now does any one suppose, that upon such a state of facts, C., in the firm name, could go to speculating in iron on the New York market, buying and selling immense quantities for future delivery—single transactions amounting to over ten times the entire capital of his firm—and that the iron dealers of New York could hold D. liable upon such transactions of C., *because they had seen the firm's letter-head?* We do not believe that to be the law. The letter head is notice of the *location* of the firm, as well as of the kind of business it is engaged in; and when one has notice of the *locality* and home of the firm, he is bound by the scope of the partnership business of that firm, as ascertained, defined and understood *at the place where the firm is located and the partnership business carried on.*

In order to show how far these instructions fall short of giving the jury a fair opportunity to pass upon and determine the scope of the partnership business of Irwin & Davis, the attention of the court is now directed to some of the facts proved which, under proper instructions, would have enabled the jury to pass justly upon the question, whether or not the transactions forming the cause of action of Williar & Son against Irwin come fairly and legally within the scope of the partnership business of the firm of Irwin & Davis.

Evidence was introduced touching the following points:

1. The *locality*, surroundings, buildings and facilities of the firm.—The evidence shows that the firm of Irwin & Davis was located at Brazil, Ind.; that its buildings consisted of a mill prepared for grinding wheat, with an average daily capacity of thirty barrels of flour; also prepared for grinding corn in a small way; that a wareroom was attached to the mill building, furnishing facilities for storage of only a comparatively small amount of grain; that the "plant" of the firm at Brazil was in all respects suited for the carrying on of the business of merchant milling in a small way.

2. The working capital of the firm.—The evidence showed a working capital of from $2,000 to $4,000, competent only for the carrying on of a small business.

3. The usual volume of business of the firm.—The evidence proved the usual and ordinary volume of business of the firm of Irwin & Davis to be comparatively small, and to fairly comport with its locality, facilities and capital.

4. The common and general understanding of the community at Brazil, Ind., as to the nature, scope and extent of the partnership business of the firm of Irwin & Davis, viz: That it was known and recognized as merchant milling, and that the firm conducted its business as such a business is usually and ordinarily carried on in towns of the size of Brazil, the firm buying wheat and corn from the surrounding farmers and manufacturing it into flour and meal and selling the products; that in the ordinary course of their business as merchant millers they bought all such wheat and corn as was offered at their mill, and only shipped for immediate sale what they had not storage capacity to keep for manufacturing purposes.

5. Previous shipments made by the firm of Irwin & Davis to Baltimore.—*That no wheat was ever shipped to Baltimore or any eastern market prior to July, 1877;* that for years the firm had shipped flour, and occasionally some corn, to Baltimore, never in larger quantities than from one to four car loads at a time, and always for sale on delivery.

6. Previous dealings between Williar & Son and the firm of Irwin & Davis.—That in the year 1875, Irwin & Davis shipped several such small consignments of *corn*, and perhaps some flour, to Williar & Son for sale on immediate delivery, but that no *wheat* was ever shipped to them by, or in the name of, the firm of Irwin & Davis prior to July, 1877; that in the correspondence between Williar & Son and Irwin & Davis in 1875, and subsequent thereto, which

was all conducted by Davis in behalf of the firm of Irwin & Davis, a letter-head was used containing in print "Brazil Flouring Mills, Irwin & Davis, Millers and Dealers in Grain, Brazil, Indiana," and that the same kind of a letterhead was used by Davis in the letters written by him to Williar & Son in relation to the transactions involved in this action, and that the entire correspondence with Williar & Son, in the name of Irwin & Davis, was in one handwriting, and was all written by Davis.

7. That prior to July, 1877, Davis never had in his own name, or in the firm name of Irwin & Davis, ordered any purchase or sale of any wheat, or of any kind of grain or merchandise, in the Baltimore market, or in any eastern market, *for future delivery;* that the only dealings Davis had had in the Baltimore market, or in any eastern market, prior to the summer of 1877, either in his own name or in the firm name, were confined to small consignments of corn and flour for sale on immediate delivery, such consignments never exceeding $1,000 in value each.

8. The enormous magnitude of the alleged transactions involved in this action as compared with the prior dealings between Williar & Son and Irwin & Davis, and as compared with the ordinary and habitual business of the firm as carried on *at Brazil,* and as *there* understood and recognized, the smallest of said alleged transactions amounting to far more than the entire working capital of the firm of Irwin & Davis, while the largest of said alleged transactions amounted to over $50,000, being more than ten times the entire working capital of said firm of Irwin & Davis, said alleged transactions within less than three months amounting in the aggregate to over $250,000, said alleged transactions calling for the delivery at Baltimore, by Irwin & Davis, within two and a half months, of 165,000 bushels of wheat, all to be of a certain grade and quality.

9. The fact that these alledged transactions were recognized by Williar & Son as being *unusual* and startlingly

large.—So unusual and large were they, that Williar & Son immediately instituted careful inquiry as to the pecuniary responsibility, not only of the firm of Irwin & Davis, but also of the individual members of the firm. By this inquiry Williar & Son must have learned that Irwin lived in Pennsylvania, and that the bulk of his property was in that State. If these alleged transactions were so *unusual* and of such *magnitude* as to put Williar & Son upon their guard, and cause them to institute inquiry as to the pecuniary responsibility of the firm and its individual members, were they not so *unusual and of such magnitude* as to have reasonably put Williar & Son upon their guard *as to whether or not they were within the scope of the partnership business of Irwin & Davis?*

The bill of exceptions shows that evidence was introduced tending to prove each of these points. They were facts proved in the case. That they were pertinent and applicable to Irwin's defense, that these alleged transactions were not within the scope of the partnership business, and therefore did not bind the firm of Irwin & Davis, can not be questioned. These are just the kind of facts that the law lays down as proper and absolutely necessary in determining the scope of the partnership business of a firm, and limiting its liability for acts attempted in its name by one of its members. Yet not a single one of these points is mentioned, or even alluded to, in the entire charge of the court relative to this evidence. Parts of the fifth and sixth points above given are made very prominent in the charge, viz:

The fact that "Davis did buy and ship *grain* to some extent in the firm name," and the "letter and bill-heads of the firm."

A careful examination will prove that these two facts are the only ones *in favor of Williar & Son.* Every other fact above mentioned strongly supports Irwin's defense, but not a word is said to the jury about any one of them. No rule of law is given to the jury by which they could apply this evidence, or utilize it in support of the defense it was introduced to prove. Is such a charge fair and legal? If so, the value of trial by jury is scarcely perceptible.

We submit that the charge of the court as given in instructions numbered 1 to 4, inclusive, are erroneous. Counsel for Irwin asked the court to give to the jury each of the following instructions, as applicable to the evidence under consideration:

"1. This is an action brought by plaintiffs against the defendant, as surviving partner of the late firm of Irwin & Davis, to recover a balance alleged to be due from said firm of Irwin & Davis to plaintiffs. The transactions out of which it is claimed this balance grew were certain sales and purchases of wheat for future delivery, claimed to have been made by plaintiff for said firm of Irwin & Davis, upon the orders of said firm. The defendant denies his liability to plaintiffs for the alleged balance, upon two grounds.

"The first ground is that the transactions out of which the alleged balance grew were transactions made by George M. Davis, a member of the firm of Irwin & Davis, in the name of said firm, but without the actual knowledge of defendant, and were not *bona fide* sales and purchases, but were mere shams for the purpose of playing, betting, wagering and gambling upon the rise and fall of the price of wheat, and that plaintiffs knew said facts, or were bound to know them, by reason of their knowledge of facts showing that it was the intent to gamble on prices.

"The second ground of defense is that the transactions out of which the alleged balance grew were made by George M. Davis, in the name of the firm of Irwin & Davis, but without the knowledge or consent of the defendant, and that such transactions were in fact outside the scope of the partnership business of the firm of Irwin & Davis, and that plaintiffs had reason to know that such transactions were outside the firm business.

"2. The plaintiffs, in order to make out their *prima facie* case, must show that the transactions out of which the alleged balance grew were made upon orders from the firm of Irwin & Davis, and must also show that those transactions were such as they had a right to believe, from what knowledge they had of the business of Irwin & Davis, were within the regular business of said firm.

"3. The plaintiffs claim to have dealt with the firm of Irwin & Davis. In dealing with said firm plaintiffs were bound to know what the business of that firm was, and if they chose to deal with said firm in matters outside the scope of that business they can not recover against defendant unless he knew of such dealings and did not dissent therefrom.

"4. The scope of the partnership business is to be determined by you, considering all the evidence introduced upon that subject.

"The fact that Irwin & Davis were engaged in the milling business at Brazil, Indiana, and also shipped grain to some extent from that point in amounts of one to four car loads, for immediate sale, would not of itself justify plaintiffs in believing that the scope of the business of said firm embraced the sale of grain in amounts of 10,000 to 40,000 bushels for future delivery

"5. Plaintiffs are not bound to know the precise limit of the partnership business of the firm of Irwin & Davis, but if they had had transactions for a year or more with the firm of Irwin & Davis, prior to those transactions out of which the alleged balance grew, and by such prior transactions had become familiar to some extent with the general amounts of the dealings of said firm, the plaintiffs had no right to suppose, without inquiring as to the fact, that the business of said firm had suddenly changed so as to embrace dealings of fifteen to fifty times the amount of the largest of any such prior dealings.

"6. The fact that the firm of Irwin & Davis may have been in the habit of shipping flour and grain to plaintiffs in amounts of 1 to 4 car-loads, for immediate sale, would not of itself justify plaintiffs in believing that the business of Irwin & Davis embraced the sale for future delivery of wheat in amounts of from ten to forty times the amount of such shipments.

"7. The fact that the firm of Irwin & Davis shipped wheat for immediate sale would not of itself justify plaintiffs in believing that the business of Irwin & Davis embraced the selling of wheat for future delivery.

"8. The place at which the firm of Irwin & Davis was located, the probabilities of their being able to get the amount of wheat they had sold for future delivery, the ability or lack of ability of the firm to handle the amount of wheat ordered sold, the amount of dealings in former years, and the amount of actual shipments as compared with sales ordered, are proper matters for you to consider in determining what the scope of the business of Irwin & Davis was, and whether it embraced such transactions as those out of which the alleged balance mentioned in plaintiffs' complaint grew.

"9. You will bear in mind that the burden is on the plaintiffs to establish by a preponderance of the evidence that the transactions, out of which the alleged balance grew, were within the scope of the partnership business of Irwin & Davis. If they have failed to do so your verdict must be for defendant.

"10. By the scope of the partnership business of Irwin & Davis as used in the preceding instructions is meant the apparent scope of that business upon which third parties, dealing with the firm, would have a right to rely. And in determining what that scope was you will take into consideration the means of knowledge the plaintiffs had, including all dealings prior to the contested transactions, the amount of such prior dealings, the nature of those prior dealings, the known location of the firm, and the general reputation as to the character of the business of the firm of Irwin & Davis.

"11. If you believe from the evidence that the principal business of the firm of Irwin & Davis was, in fact and by general reputation, the management of flouring mills at Brazil, Indiana, buying wheat and corn, and manufacturing it into flour and meal, and selling the manufactured product, and that, as an incident to said principal business they took all such wheat and corn as was offered at their mills, and shipped for immediate sale what they did not need for use, plaintiff would not be authorized to infer from such facts that the scope of the business of said firm embraced selling and buying wheat in large amounts in Baltimore, Maryland, for future delivery.

"12. If you believe from the evidence that plaintiffs had, in the years 1875 and 1876, a number of dealings with the firm of Irwin & Davis in amounts not as much as $1,000 in any one transaction, and amounting during those two years to about $———, and if you also believe from the evidence that the transactions upon which the plaintiffs' claim is founded consist of different transactions, beginning with a sale amounting to over $26,000, and the least of which is $6,600 and the greatest over $50,000, all occurring during about 2½ months, and all for future delivery, and amounting to over $251,000, I leave it for you to say whether such sudden change in the nature of the dealings was not sufficient to put plaintiffs on their guard, and to charge them with knowledge that such transactions were outside the proper partnership business of Irwin & Davis, if such be the fact.

"13. The law presumes that the business of a firm is to be transacted at the place where the firm is established and its place of business located.

"Such being the presumption of law, it was the duty of plaintiffs to inform themselves whether any purchases of wheat ordered by the firm of Irwin & Davis were within the scope of the partnership business, and plaintiffs are chargeable with notice whether or not such purchases were in fact within the scope of the firm business of Irwin & Davis.

"14. If you believe from the evidence that plaintiffs were, in the month of July, 1877, and before any of the alleged losses had occurred which are stated in plaintiffs' complaint, ordered to buy for Irwin & Davis 10,000 bushels of wheat in Baltimore, and if you also believe from the evidence that such purchase was not actually within the scope of the partnership business of Irwin & Davis, as agreed between themselves by the partners of said firm, the fact that such purchase was made at so great a distance from the place where the firm is located, and was not within the partnership business in fact, would be sufficient to put plaintiffs on their guard, and to charge them with notice that the partner ordering such purchase was attempting to deal outside the scope of the partnership business, and any transactions thereafter made with such partner by plaintiffs would be at their own peril."

The court refused to give each of these instructions. They certainly were not refused, because they were covered by the instructions given by the court on its own motion. We affirm, without fear of successful contradiction, that the charge as given by the court does not cover any single one of these fourteen instructions asked

Our first instruction describes the basis of Williar & Son's claim as sales and *purchases* of wheat for future delivery. The declaration, itemized account of Williar & Son, and the evidence introduced, prove this first instruction correct, and at the same time prove the first instruction given by the court to be incorrect. All the other instructions above set forth pertained directly to the defense under consideration, and seek to give to the jury the rules of law by which they could ascertain from the evidence the scope of the partnership business of Irwin & Davis, and define the limits of the liability of the firm for the acts of one of its members. Every fact alluded to in these instructions, and every amount named in them, can be substantiated by reference to the bill of exceptions and the pleadings in the action. The principles of law embodied in these instructions have already been discussed, and authorities in their support have been cited. The jury certainly ought to have been instructed on the points covered by these instructions. The charge of the court contains nothing on these points. We asked these instructions. The court refused them. In this we believe the court erred. We therefore ask this court to reverse this judgment, because the court committed error in the instructions given, and because the court erred in refusing to give instructions asked as pertaining to the defense of Irwin, that the alleged transactions upon which this action is based were not within the scope of the partnership business of the firm of Irwin & Davis.

INSTRUCTIONS GIVEN AND REFUSED UPON THE DEFENSE THAT THE ALLEGED TRANSACTIONS WERE WAGERING CONTRACTS AND VOID.

One of the defenses of Irwin was that the alleged contracts, forming the basis of the claim of Williar & Son, were not *bona fide* sales and purchases, but were mere shams for the purpose of playing, betting, wagering and gambling upon the rise and fall of the price of wheat, and that Williar & Son knew said facts, or were bound to know them, by reason of their knowledge of facts showing that it was the intent to gamble on prices. The consideration of the instructions given and refused by the court relative to this issue, and the evidence introduced in its support, involve the law upon the following points:

1. The law drawing the line between valid and void option contracts for the sale and purchase of commodities for future delivery.

2. The effect to be given to the mere form of the contract, the presumptions of law relative thereto; whether the intent of the parties in making the contracts is a question of fact for the jury; how the intent of the parties is to be proved; and where the burden of proof rests.

3. The law defining when and under what circumstances brokers can not recover advances claimed to have been made by them upon alleged transactions for undisclosed principals.

4. Whether what are termed by brokers "Ring Settlements" are valid and legal, and the effect of such "Ring Settlements."

5. How far usage or custom at a particular place, and in a particular trade, is binding upon distant parties entering into contracts in relation to that trade, to be performed at that place.

Upon these points we submit the following propositions of law supported by authorities cited:

1. *Option contracts for the sale, or purchase, of commodities for future delivery, where the intention of the parties is that there shall be no actual delivery, but that the transactions shall be adjusted and settled by the payment of the difference between the contract price and the market price at the time the transactions are closed, are illegal and void.*

Cobb v. *Prell*, U. S. C. C. Dist. Kan., McCRARY J., 15 Fed. Reporter, No. 11, May, 1883, p. 774; S. C. Cen. L. Jour., Vol. 16, No. 23, June 8, 1883, p. 453. *Melchert* v.

American Union Telegraph Company, U. S. C. C., Dist. Iowa, Love J., 3 McCrary's U. S. C. C. Reports, 521; S. C. 11 Fed. Reporter, No. 3, May 9, 1882, p. 193. *In re Green*, U. S. D. C., W. Dist. Wis., Hopkins J., 7 Biss. 338; S. C. 15 Nat. Bank Reg 198. *Bartlett* v. *Smith*, U. S. C. C., Dist. Minn., Nelson J., 13 Fed. Reporter, No. 6, Sept. 26, 1882, p. 263. *Union Nat'l Bank* v. *Carr*, U. S. C. C., Dist. Iowa, Love J., 15 Reporter, 353; S. C. 15 Fed. Reporter, No. 6, April, 1883, p. 438. *In re Chandler*, U. S. D. C., N. Dist. Ill., Blodgett J., Am. Law Reg., Vol. 13 (N. S.), p. 310, May, 1874. *Ex parte Young*, 6 Biss. 53, Blodgett J.; *Grizewood* v. *Blane*, 73 Eng. Com. Law Reps. 525, *pp. 539 to 542; S. C. 20 Eng. L. and Eq. Reps. 290; *Steers* v. *Lashley*, 6 Term Reps. 61; *Barry* v. *Croskey*, 2 Johnson and Hemming's Eng. Ch. 29; *Ex parte Marnham*, 2 De Gex. Fisher & Jones, 634; *Rourke* v. *Short*, 34 Eng. L. and Equ. 219; *Brua's Appeal*, 55 Pa. St. 294; *Kirkpatrick* v. *Bonsall*, 72 Pa. St. 155; *Maxton* v. *Gheen*, 75 Pa. St. 166; *Fareira* v. *Gabell*, 89 Pa. St. 89; *North* v. *Phillips*, 89 Pa. St. 250; *Gheen, Morgan & Co.* v. *Johnson*, 90 Pa. St. 44; *Ruchizky* v. *De Haven*, 97 Pa. St. 202; *Dickson's Executor* v. *Thomas*, 97 Pa. St. 278; *Patterson's Appeal*, S. C. Penn. 1883; *Hawley* v. *Bibb*, S. C. Ala. Dec., 1881; *Barnard* v. *Backhaus*, 52 Wis. Reps. 593; *Everingham* v. *Meighan*, 55 Wis. Reps. 354; *Gregory* v. *Wendell*, 39 Mich. 337; *Raymond* v. *Leavitt*, 46 Mich. 447; *Sampson* v. *Shaw*, 101 Mass. 145; *Rumsey* v. *Berry*, 65 Maine 574, 575; *Waterman* v. *Buckland*, 1 Mo. App's 45; *Williams* v. *Carr*, 80 N. C. Reps. 294; *Noyes* v. *Spaulding*, 27 Vt. 429; *Bigelow* v. *Benedict*, 70 N. Y. 206; *Story* v. *Salomon*, 71 N. Y. 422; *Yerkes* v. *Salomon*, 18 N. Y. Supr. Ct. (11 Hun.) 473; *Tenney* v. *Foote*, 95 Ill. 101 and 106; *Lyon & Co.* v. *Culbertson, Blair & Co.*, 83 Ill. 33; *Pickering* v. *Cease*, 79 Ill. 328.

2. *The form of the contract is not at all conclusive as to the intent of the parties to it. Where contracts are legal in form, the presumption of law is in favor of their validity; but where*

the transactions on their face—either by reason of their magnitude, or on account of circumstances surrounding them—are such as to raise a reasonable doubt regarding the intention of the parties, this presumption of law should have but little weight. The question of intent is a question of fact to be submitted to the jury under the light of all the evidence in the cause. The actions of the parties in connection with the transactions in controversy; their correspondence and contemporaneous declarations regarding said transactions; the prior dealings of said parties with each other; the magnitude of the transactions in controversy as compared with prior dealings between the same parties; the probable pecuniary and physical ability of the parties to make actual performance of the contracts within the time limited; and all surrounding facts and circumstances tending to prove the real intention of the parties when they entered into the contract, should all be submitted to, and considered by, the jury in determining the question of intent.

Kirkpatrick v. *Bonsall*, 72 Pa. St. 155; *Fareira* v. *Gabell*, 89 Pa. St. 89; *Barnard* v. *Backhaus*, 52 Wis. 593, 597, 600; *Gregory* v. *Wendell*, 39 Mich 337; *Yerkes* v. *Salomon*, 15 N. Y. Supr. Ct. (11 Hun.) 473; *Barry* v. *Croskey*, 2 Johnson & Hemming's Eng. Ch. 29; *In re John Green*, 7 Biss. 339; *Cobb* v. *Prell*, 15 Fed. Reporter, No. 11, May, 1883, p. 774; *Rumsey* v. *Berry*, 65 Maine 574, 575; *Bartlett* v. *Smith*, 13 Fed. Reporter, No. 6, p. 264; *Bigelow* v. *Benedict*, 70 N. Y. 206; *Biddle Law of Stockbrokers*, 313.

Some authorities of high standing, and entitled to grave consideration, go farther, and hold squarely—

That if, in case of an option contract for future delivery; there is a doubt as to the intent of the parties, the burden will be upon the party claiming under such contract to show affirmatively that it was made with a view to the actual delivery and receipt of the commodity.

Cobb v. *Prell, supra.*
Barnard v. *Backhaus, supra.*

McCrary J. in *Cobb* v. *Prell*, says:

"It is the duty of the courts to scrutinize very closely these time contracts, and if the circumstances are such as to throw doubt upon the question of the intention of the parties, it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to delivery and receipt of the grain," citing *Barnard* v. *Backhaus*, in which the Supreme Court of Wisconsin uses precisely the same language.

3. *Where brokers, in form, make contracts for future delivery in their own names with other brokers, claiming to base said contracts upon orders received by them from persons whose names they do not disclose, and where, from all the facts and circumstances surrounding the transactions, it appears that the persons giving the orders did not intend any actual delivery, but merely a settlement and payment of differences, and that the brokers making such contracts in their own names had reasonable cause to believe that no actual delivery was intended, but merely the settlement and payment of differences, such brokers can not recover from their undisclosed principals money paid out by them in the settlement of differences on such contracts made by them in their own names.*

In re John Green, 7 Biss. 338; *Melchert* v. *Am. Union Tel. Co*., 3 McCrary, 521; *Bartlett* v. *Smith*, 13 Fed. Rep. No. 6, Sept. 26, 1882, p. 263; *Cobb* v. *Prell*, 15 Fed. Reporter, No. 11, May, 1883, p. 774; *Steers* v. *Lashley*, 6 Term Reports, 61; *Raymond* v. *Leavitt*, 46 Mich. 447; *Everingham* v. *Meighan*, 55 Wis. 354; *Fareira* v. *Gabell*, 89 Pa. St. 89; *North* v. *Phillips*, 89 Pa. St. 250; *Ruchizky* v. *De Haven*, 97 Pa. St. 202; *Dickson's Executor* v. *Thomas*, 97 Pa. St. 278; *Sampson* v. *Shaw*, 101 Mass. 145; *Tenney* v. *Foote*, 95 Ill. 99; see also S. C. 4 Bradwell, 594; *Thomson* v. *Cummings*, S. C. Geo., Dec. T., 1881, 13 Reporter, 428.

We do not understand the case of *Rountree* v. *Smith*, U. S. Supreme Court, April, 1883, MILLER J., 15 Reporter 609, as conflicting with this proposition, or with the authorities cited in support of it. On the contrary, it tends strongly to support our proposition. In the case at bar Williar & Son never made a single contract in the name of Irwin & Davis. They claim to have made contracts with other brokers on the Board *in their own names*, and afterwards cancelled and surrendered these contracts by "Ring Settlements" *before the options expired*, and charged up the differences they claim to have paid on such "Ring Settlements" to Irwin & Davis. Irwin & Davis were not known in, or parties to, any contracts made by Williar & Son. The "Ring Settlements" proved the intention of the brokers who made contracts with Williar & Son, to make no actual delivery but simply to settle differences.

4 *"Ring Settlements,"—in which several brokers—being members of a board of exchange association, or corporation, the members of which only are permitted to deal and contract with each other on 'Change—before the time fixed for the delivery of the commodity sold or purchased, and while the option is still running within which delivery may be made by the terms of the contracts as originally made, form a circuit or "ring" among themselves, and set off, and cancel, the contracts they hold against each other made upon orders received by them from their various customers, surrendering margins put up, and paying differences between the prices named in the cancelled contracts and the market price at the time the "Ring Settlement" is made—are not binding upon the customers of such brokers. Such "Ring Settlements" do not constitute a performance of the several contracts involved, but merely a cancellation and surrender of such contracts upon the payment of differences. Such "Ring Settlements" negative any intention, upon the part of brokers making them, to actually perform the cancelled and surrendered contracts. The contracts no longer remaining in existence, such settlements render actual delivery in pursuance and performance of the original contracts impossible, and make it easy and practicable for a ring of brokers to force settlemennts and payment*

of differences at fictitious and purely speculative prices, before the expiration of the options named in the contracts, and utterly regardless of the fair market value of the commodity at the expiration of the time limited for actual performance. Such "Ring Settlements" are illegal, fraudulent and void as between brokers and their customers.

Melchert v. *Am. Union Tel. Co.*, 3 McCrary, 521.
Lyon & Co. v. *Culbertson, Blair & Co.*, 83 Ill. 38, 40, 44.
Clarke v. *Foss*, 7 Biss. 540.
Dickson's Executor v. *Thomas*, 97 Pa. St. 278.

5. *Usage or custom, at any particular place or in any particular trade or business, in order to be binding as entering into and forming part of a contract, must be known to both parties at the time the contract is made. There must be, in the minds of both parties, a knowledge of the usage or custom, and they must both act in reference to it.*

Bliven et al. v. *New England Screw Co.*, 23 Howard, 420 and 431.
Foley & Woodside v. *Mason & Son*, 6 Md. Reps. 43, 49, 50.
Murray v. *Spencer*, 24 Md. Reps. 524.

Some authorities seem to hold that if *either party* to a contract of the kind under consideration intends no actual performance, but simply a wager on the rise and fall of prices, the contract would be void. There would seem to be some reason for so holding, on the theory that two minds must meet and agree with reference to some matter or thing, lawful in itself, before there can be any lawful contract. In the case *In Re Green*, 7 Biss. 341, HOPKINS, J., says:

"Did the bankrupt intend or mean to deal in the property, or only pay the difference in price at a future day? If the latter, the contract within the decisions above referred to is void."

Other cases might be cited to the same effect, but the point is not at all material in considering the case at bar.

With this summary of adjudged cases in view, we wish to call the attention of the Court to instructions given and refused upon this branch of the case. The Court gave to the jury the following instructions:

"5. If you find that the dealings with the plaintiffs were within the scope of the partnership, you will next consider whether the dealings were gambling transactions. The burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal, and the law does not, in the absence of proof, presume that parties are gambling.

"A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate, can not be held void as a wagering contract by showing that one party only so understood and meant it to be The proof must go further, and show that this understanding was mutual—that both parties so understood the transaction. If, however, at the time of entering into a contract for the sale of personal property for future delivery, it be contemplated by both parties that at the time fixed for delivery, the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager, and nothing more. It makes no difference that a bet or wager is made to assume the form of a contract; gambling is none the less such because it is carried on in the form or guise of legitimate trade.

"6. It is not sufficient for the defendant to prove that

Irwin & Davis never understood that they were to deliver wheat in fulfillment of the sales made for them by the plaintiffs. The presumption is that the plaintiffs expected Irwin & Davis to execute their contracts, expected them to deliver the amount of grain sold; and before you can find that the sales were gambling transactions and void, you must find from the proof that the plaintiffs knew, or had reason to believe, that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly. If the plaintiffs made sales of wheat for Irwin & Davis for future delivery, understanding that these contracts would be filled by the delivery of grain at the time agreed upon, Irwin & Davis were liable to the plaintiffs, even though they meant to gamble and nothing more.

"7. The testimony tends to show that a general custom obtained among grain commission merchants in Baltimore to the following effect: When one commission merchant, upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and where it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase the same or a larger quantity of the same kind of grain for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then, in such case, the two commission merchants meet together and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts, and restoring any margins that may have been put up, and that from that time forth the first commission merchant holds for the benefit of the customer for whom he sold the order or contract of the purchaser for whom he bought, so that the wheat of the selling customer may, when delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as guarantor to his customer.

"The evidence further tends to show a custom obtaining among commission merchants at Baltimore to the further effect that, though the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain, for like delivery, so that the seller owes the wheat to the buyer to whom he sold, and he to another who owes like wheat for like delivery to the first commission merchant, that then, in such case, they settle by what they call "A Ring," that is, they all reciprocally surrender or cancel their contracts, adjust the price differences between themselves, and surrender all margins that had been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been cancelled or surrendered, and that he guarantees to his customer the performance of the contract originally made on his behalf.

"I say to you, gentlemen, that these customs are founded in commercial convenience; that they are not in contravention of the law, and that they are valid.

"8. In determining what the intention of the parties was in these transactions, you will carefully weigh all the evidence. Henry D. Williar, one of the plaintiffs, testifies that the plaintiffs expected Irwin & Davis to execute their contracts by delivering the amount of wheat sold. It seems that the plaintiffs sold for Irwin & Davis, for delivery in about two and a half months, 165,000 bushels of wheat. Did Irwin & Davis expect to deliver this amount of wheat within this time? Did the plaintiffs expect Irwin & Davis to enable the plaintiffs to deliver this amount of wheat within the time fixed for delivery? In this connection you will consider the previous dealings between Irwin & Davis and the plaintiffs; the ability of Irwin & Davis to engage in transactions of this magnitude, and the opportunity which the plaintiffs had had to know the extent and character of the business of Irwin & Davis, and their financial standing and ability, and the importance of Baltimore as a grain market."

We object to the fifth instruction:

First. Because it withdraws from the jury the consideration of the question whether the transactions shown by the evidence were or were not gambling transactions upon their face, and instructs the jury that upon their face they are legal. The language of the instruction is: "On their face these transactions are legal." That is an important question Irwin had a right to have the jury determine. This is very different from instructing the jury that "The alleged contracts sued on are legal in form." That would have been the utmost the court ought to have said, leaving the jury to consider the *face of the transactions* as one item of evidence, and in this case a very important one, tending to prove whether or not the parties intended real transactions, or merely used these contracts, in form, for the purpose of wagering on the price of wheat. By this sentence of this instruction, which is in substance repeated and emphasized in another clause of this same instruction, this important item of evidence—*the face of these* ~~*instructions*~~ transactio is entirely withdrawn from the jury, and instead of being a help to Irwin in sustaining his defense, is turned into a most powerful weapon against him.

The *form* of a series of *contracts* is one thing, the *face* of a series of *transactions* is a very different thing. The first is simply the word clothing of a series of acts; the last is *the looks, the outward appearance of the acts themselves.* The face of one transaction may look legal and *bona fide*, while the face of another transaction may look illegal and *mala* *fide*, although both transactions may be clothed with the same form of words.

Suppose Davis had, on July 12, 1877, ordered Williar & Son to sell 20,000,000 bushels of wheat for September delivery at Baltimore, and Williar & Son had gone through the form of selling the 20,000,000 bushels to their brother brokers, will any one say that such a transaction would have looked legal and *bona fide* on its face? The order to sell and the contracts of sale between Williar & Son and their brother brokers might all be regular and legal in form, and yet *the face of the transaction*—its looks—would stamp it as an *unreal* transaction that was never intended as real and actual. Irwin had the legal right to have the jury look at the face of these transactions as one means of determining whether they were real, or merely feigned for the purpose of wagering on the price of wheat. The face of these transactions showed that they commenced by the use of a *cipher book* for telegraphing that had never been needed or used in the real transactions between these parties; that Williar & Son, while claiming to act as brokers for Irwin & Davis, pretended to *sell to themselves* one-fourth of the very first order of Davis, and before the option expired pretended to *buy from themselves* 5000 bushels of wheat and deliver it to themselves to fill the contract of sale they had made to themselves on Davis' order, charging to Irwin & Davis commissions for both buying and selling this 5000 bushels of wheat, which was never either sold or bought or delivered, and had no real existence (this instruction charges that that transaction with the others was legal on its face); that Davis, claiming to act for the firm of Irwin & Davis, operating the Brazil flouring mills, at Brazil, Ind., ordered sales of 165,000 bushels of wheat, all to be delivered at Baltimore within two and a half months, 105,000 bushels of it to be delivered in the single month of September; that actual performance of the alleged contracts would have required the use of not less than $200,000 in ready money; that during the running of these option contracts Davis did ship thirty-one car loads of wheat to Williar & Son, *all of which was sold by Williar & Son on arrival* and the money sent to Irwin & Davis, or kept by Williar & Son as margins, except one car load; that long before the day for delivery arrived, Williar & Son cancelled and surrendered the alleged contracts of sale, covering 125,000 bushels of the 165,000 bushels, and had paid the difference between the price named in the contracts and the market price at the time the contracts were surrendered and destroyed, and charged these differences to Irwin & Davis, which differences form the bulk of this claim of Williar & Son; that 125,000 bushels of the wheat named in these alleged contracts never had any existence in fact, but was simply named in the alleged contracts for future delivery, which contracts were surrendered and destroyed before the day of delivery arrived; that as to the remaining 40,000 bushels, no charge or expense whatever for hauling, handling, storage, weighing or insurance, appears.

These are some of the prominent features that stand out upon the face of these transactions, yet the court charges the jury, "*On their face these transactions are legal,*" and thereby withdraws these important matters from consideration by the jury. We submit that this was error and that it greatly prejudiced the rights of Irwin.

Second. We object further to this fifth instruction because while pressing upon the attention of the jury the fact that there may be valid sales for future delivery of articles which the seller does not then own or possess, the court fails to point out to the jury any rule by which they are to determine, by an application of the law to the evidence introduced, whether the transactions involved in this action were or were not wagering transactions.

Third. If the cases of *Cobb* v. *Prell* and *Barnard* v. *Backhaus, supra,* are correct in holding that in case there is a doubt as to the *intention* of the parties, the *burden of proof* is on the party claiming relief under the alleged contracts, the court erred in charging that the burden of proof is on Irwin in this issue, for it certainly can not be seriously questioned that the face of these transactions taken together, raises a reasonable doubt as to the intention of the parties to actually perform the alleged contracts.

It should be stated in this connection that several of the decisions of the Supreme Court of Pennsylvania, already cited, tend most strongly to support the position taken in the two cases last above cited.

We object to the sixth instruction given by the court because it instructs the jury that the presumption is that Williar & Son expected Irwin & Davis to deliver the amount of grain sold, whereas it should have been left for the jury to determine whether it could be presumed that Irwin & Davis intended to deliver, and that Williar & Son expected them to deliver such amount of grain as said Davis ordered sold on their behalf. This sixth instruction again, in effect, withdraws from consideration by the jury all the facts and circumstances that stand out upon, and give color to, the face of these ~~instructions,~~ transactions and makes prominent before the minds of the jury a presumption of law which, if it ever legally existed, was far more than rebutted by the face of the transactions. We submit that this was error.

We object to the seventh instruction given by the court. *First*, Because it instructs the jury that it is a valid sale of grain for a broker to cancel an outstanding purchase made by him for a customer, and hold the customer's order to purchase against a present order to sell, received by him from another customer; and that "Ring Settlements" by cancellation of contracts and adjustments of differences prior to the expiration of the option named in the orders upon which such contracts are predicated, are valid as performance of contracts.

If the first clause of this instruction is correct, and good law, it would be entirely unnecessary for a Baltimore broker to go on the Board of Trade at all, if he could only procure as many orders *to buy* for distant customers, as he received orders *to sell* for other distant customers. For under this instruction he could just set off the orders to buy against the orders to sell, report to his selling customers that he had sold, and to his buying customers that he had bought, proceed to charge up his commissions and simply hold his two sets of orders as actual purchases and sales. What difference is there between this method and the one described in the first clause of the seventh instruction as to the final result? In the method described in this instruction the broker goes through the form of buying from, and selling to, a brother broker, the grain ordered bought and sold, and then cancels, surrenders and blots out of existence the contracts of purchase and sale long *before their maturity.* When he has gone through these forms, what has he left? *Simply the orders received from his two classes of customers.* In the method we have given above we simply save the broker the trouble of making and destroying the contracts. The result reached is precisely the same as in the case laid down by the court in the first clause of this instruction. Is it possible that this is the law? But this is not the worst feature of this clause of this instruction. It not only charges the jury that it is legal and valid for a broker to set off orders to buy against orders to sell and hold the two sets of orders as actual purchases and sales *in cases where the buying and selling price is the same, and where the quantities are the same,* but it goes farther and charges that it is legal and valid for a broker—*before the expiration of the option named in his orders*—to cancel and surrender contracts made by him with other brokers in fulfillment of such orders, and set off orders to buy against orders to sell, holding the two sets of orders as, and in lieu of, actual purchases and sales, *in cases where the buying price is different* *from the selling price, and where the quantities are also different,* paying the difference between the prices, and charging the same to his losing customer. Permit an illustration of this beautiful Baltimore system, which is approved and held valid by this instruction:

Suppose A. and B. are brokers, and X. and Y., distant customers of A. On August 15, X. orders A. to sell 20,000 bushels of wheat at $1 per bushel, seller's option, September. On the same day, A. goes on 'Change and sells to B., his brother broker, 20,000 bushels of wheat at $1 per bushel, seller's option, September, and makes a written contract in his own name between himself and B. to that effect. X. is not a party to, or known in, the contract. Time passes along and wheat advances in price until, on the first day of September, it stands at $1.25 per bushel. On September 1, Y. orders A. to buy 20,000 bushels of wheat for him at $1.25 per bushel, seller's option, September. A. immediately goes on 'Change, hunts up B , and buys 20,000 bushels of wheat at $1.25 per bushel, seller's option, September, and enters into another contract with B. in his own name, Y. being no party to the contract. The next day, September 2, A. and B. get together and cancel and surrender both contracts, the price being on that day $1.25 per bushel, A. pays to B. on the surrender and cancellation of the contracts $5,000, and goes to his office and charges up against X. the $5,000 he paid to B. Let us examine just how the matter now stands:

Twenty-eight days of the option still remain. A holds no contract whatever made by him, either of sale on the order of X. or of purchase on the order of Y. In other words, A. has not actually sold any wheat on the order of X., nor has he actually bought any wheat on the order of Y. B. has pocketed $5,000, without having in reality bought or sold any wheat. X. has sold no wheat. He certainly has not sold any to A , for his order to A. is surely not a contract of purchase and sale between A. and X. He certainly has not sold any wheat to B., for he never saw or heard of B. X. has no wheat sold, but he has $5,000 charged against him.

Now, suppose the matter stands just in this condition, the price of wheat remaining at $1.25 per bushel without flucuation until the 30th of September. If there is any real and legal sale of wheat here, somebody must have the right to demand from X the delivery of 20,000 of bushels wheat on September 30. Who would have that right? A. certainly would have no right to demand the wheat from X., for X. never sold or contracted to sell any wheat to A. B. surely could not demand the wheat from X., nor could X. by any possibility make B. accept the wheat if he had it all in Baltimore, and wanted to deliver it ever so badly. Y. could not demand the 20,000 bushels of wheat from X , for he has not and never has had any contract whatever with X. A., as broker or agent for Y., has not entered into any contract with X. by which he has purchased from X. 20,000 bushels of wheat for Y. If so, where is the contract, when was it made, and what are its terms? X. ordered wheat sold at $1 per bushel on August 15. Y. ordered wheat bought at $1.25 per bushel on September 1, consequently it is utterly impossible to claim that any contract exists between X. and Y., either as made by themselves, or through A. as their broker. A. could not have bought the 20,000 bushels of wheat from X. for the account of Y., because A., on August 15, had no order at all from Y., and because when he did receive an order from Y., it was an order to buy at $1.25 per bushel, while X. only asked $1 per bushel. For like reasons A. could not have sold the 20,000 bushels of wheat to Y. for the account of X.

On these facts does any one believe that Y. could maintain a suit against X. for failure to deliver 20,000 bushels of wheat, or that X. could maintain a suit against Y. for failure to accept the wheat if tendered? It being thus demonstrated that neither A., B. or Y. would have any right to demand the wheat from X. on September 30, how can it be possible that A. has the right to demand $5,000 from X. for not delivering the wheat that never has in fact been sold, and that nobody has any right to demand from X.? Yet this seventh instruction charges the jury that just such transactions are legal. Without so charging, this judgment could not have been rendered, for it rests upon transactions like this and those that are far worse.

In the above illustration we have supposed that the orders of X. to sell, and of Y. to buy, were each for the *same amount of wheat*, and that the *price remained stationary* from the time the contracts between A. and B. were cancelled and surrendered up to the expiration of the option. Now let us suppose that the order of X. was to sell 20,000 bushels, and that the order of Y. was to buy 40,000 bushels. Let us further suppose that after A. and B. had cancelled and surrendered their contracts (how it would be possible to set off a $20,000 order of sale against a $40,000 order of purchase is beyond our comprehension, ~~but~~ this instruction charges the jury that such a thing can be done. The language of the instruction is: "Where it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase the same *or a larger quantity* of the same kind of grain for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then, in such case, the two commission merchants meet together and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts," etc.); but passing that difficulty, suppose that after A. and B. had cancelled and surrendered their contracts, the price of wheat *declined*, until on September 30th, the day of the expiration of the option, and the only day any demand could legally be made on X. for delivery, even if the transactions were all actual and real, the price of wheat is again only $1.00 per bushel. Now could A. collect from X. the $5000 paid to B. by A. and charged to X. on September 2? The proposition seems absurd, yet such is the inevitable result of holding this Baltimore system of set-offs and "Ring Settlements" valid. If X. had made a square written contract with A., selling him 20,000 bushels at $1.00 per bushel, seller's option, September, and the market price of wheat at the place of delivery was, on September 30th, the day the contract matured, only $1.00 per bushel, A. could not recover from X. the difference between $1.00 per bushel and a higher price that may have obtained during some part of the month of September.

The illustration given above was one in which only two brokers and two customers of one of the brokers were interested. The "Ring Settlement" is a much more complicated affair. The illustration given would seem to present difficulties enough, but it is simple compared with the "Ring Settlement." The second clause of this seventh instruction describes a Baltimore "Ring Settlement," and charges the jury that such settlements are valid. It must be remembered that the instruction charges that "Ring Settlements" may be made *before the maturity of the contracts*; that is, before the options expire. In order to get a view of a "Ring Settlement" we have only to expand the illustration already given by supposing that there are ten, twenty or thirty brokers who have bought and sold among themselves at various prices, all contracts being made in their own names, but claimed by them to be made for their various customers. Then suppose all of these brokers, on the 5th of September, form a ring, and cancel and surrender all their contracts for September delivery, paying and receiving, as the case may be, the differences between the prices named in the contracts and the *then market price*, and charging these differences paid to the losing customers. Now a moment's reflection will show that such a "Ring Settlement" would render the actual performance of all the contracts involved in it *absolutely impossible.* Suppose that *after* such a "Ring Settlement," and after prices have materially changed from what they were at the time of the "Ring Settlement," a dozen of the customers who have been informed by their brokers that purchases had been made in compliance with their orders, but whose orders have been, without their knowledge, involved in a "Ring Settlement," should demand their wheat on the last day of the option. It is perfectly evident that they could not get it. The "Ring Settlement" is based upon the theory that no actual delivery is to be made or is *intended*, and renders actual delivery and performance of contracts involved in it impossible. The case of *Clarke* v. *Foss*, 7 Biss. 548, states this very clearly.

"The object of forming these rings or clearing-houses is to close out the transactions, and get them off their books; and this is what they call 'ringing it out.' But that it frequently can not be done in that way; as if, for any reason, one whose assistance is essential to complete the circle prefers an actual delivery, in which case the ring is 'burst,' and then each must perform his contract by actual delivery of the grain."

This same case of *Clarke* v. *Foss* holds one kind of "Ring Settlements" valid, but when we come to examine the "Ring Settlement" thus held valid, we find that it contains two very wide differences from the "Ring Settlements" held good by the instruction now under consideration.

1. *It was made at the maturity of all the contracts involved in it*; for in that case Bunn, J., says, on page 550:

"When these contracts matured, the defendants performed them by a delivery of the grain, except when, by the mutual arrangement of the parties concerned, the contracts were taken up and cancelled, and then they invariably paid in cash the damages which the law would have obliged them to pay upon a failure to perform their agreement; that is to say, the difference between the contract price and the market price on the day when delivery should have been made."

How very different such a settlement is from the one described in this instruction, is seen at a glance.

2. In *Clarke* v. *Foss* there was no holding over by brokers of orders to sell against orders to buy, as actual purchases and sales still existing after the "Ring Settlement." The settlement was final and absolute, and wiped out the orders given by the customers to their brokers, as well as the contracts made by the brokers in their customers' names pursuant to those orders. How different that is from the Baltimore "Ring Settlements" which this instruction holds valid. Here the "Ring Settlements" are made BEFORE the maturity of the contracts. They are settlements made without the knowledge or consent of the customers whose rights and interests they pretend to control and adjust. The brokers making these "Ring Settlements" hold the orders of their customers to purchase and sell, as still existing purchases and sales, after they have cancelled and surrendered the contracts they claim to have made in the fulfillment and execution of such orders, and claim to hold their customers liable to them on such orders so held over by them after the "Ring Settlements." These Baltimore "Ring Settlements" negative any intent to actually perform the pretended contracts involved in them, and render such actual performance absolutely impossible. That such "Ring Settlements" render it easy for a combination of brokers to manipulate the market and force prices up to a fictitious point, beyond all legitimate trading, for the purpose of enriching each other at the expense of their customers, is evident.

The case of *Melchert* v. *Am. Union Tel. Co.*, 3 M'Crary, 521, holds claims based upon a "Ring Settlement" much like those described in this instruction, but less objectionable, to be invalid. The case is a very interesting and instructive one on many points involved in this action. It clearly describes both the simple "Ring Settlement," where two brokers are engaged in the cancellation and surrender of contracts, and also the compound or regular "Ring Settlement." The description is as follows:

"Finally, how were the contracts in question adjusted by Gerstenberg? He had, in July and August, sold for September delivery, seller's option, 10,000 bushels of rye to the firm of A. M. Wright & Co., and 5000 bushels to another party in his own name, but for the plaintiff's account. On the ninth of September, after this factor had received orders to 'cover rye,' etc., he purchased from A. M. Wright & Co. 15,000 bushels of rye, at, I suppose, of course, the then prevailing rate of 85 cents. Gerstenberg was then, by the form of his contract, to deliver to Wright & Co. 10,000 bushels of rye at 65½ cents per bushel, and Wright & Co. were bound in terms to deliver to Gerstenberg 15,000 bushels at the price prevailing on the ninth of September; that is, 85 cents per bushel. But was any rye delivered or intended to be delivered by either party, or was it their understanding that their respective contracts should be settled and satisfied by the payment of differences? How can we judge of their intentions except by considering what they actually did in adjusting their contracts? Is it not just to conclude, in the absence of proof to the contrary, that parties to a contract adjusted according to their understanding of their own intentions in making it? There is no evidence that either Gerstenberg or Wright & Co. ever bought or owned a bushel of rye to deliver under their contracts. They settled by the payment of differences. It is perfectly evident that it was Gerstenberg's purpose, in the purchase of the 15,000 bushels from Wright & Co., to lay the foundation of a settlement in that way. Neither he nor Wright & Co. had evidently the least idea of investing money in these respective purchases for actual delivery. This is made further evident by the account which Gerstenberg gives of the remaining 5000 bushels which he had sold in August to another party for September delivery, at 68½ cents, on the plaintiff's account. This, he tells us, was settled by a 'ring,' of which he gives the following account: The party to whom he had sold this 5000 bushels had the same quantity and quality of grain sold to Lyon & Co.; Lyon & Co. had the same thing sold to Nichols & Co.; Nichols & Co. to Wright & Co., and Wright & Co. to Gerstenberg, as stated above. Instead of Wright & Co. delivering that rye to Gerstenberg, and Gerstenberg to the other people, and so on, so that eventually it would come back to Wright & Co., Gerstenberg simply paid the difference in money value, and 'that is what the trade terms a ring.'"

The court held that these "Ring Settlements" were convincing proof that there never was any *intention to perform*, and that both the contracts involved in them, and the "Ring Settlements" were void. In the discussion of the case BUNN, J., most forcibly says:

"Corners, and Black Fridays, and sudden fluctuations in values are the legitimate progeny of such transactions."

Other cases to the same effect are cited under the third and fourth propositions of law above given as applicable to this branch of the case at bar.

We submit that this seventh instruction is erroneous. It is very clear that this judgment is based upon this instruction, and could not have been rendered without it. The record shows this fact beyond question. Rec. p. 36.

Second. We object to this seventh instruction still farther, because it instructs the jury, in effect, that Irwin & Davis are bound by this "Ring Settlement" custom obtaining among Baltimore brokers. The bill of exceptions shows that evidence of the general observance of this custom *among members* of the Baltimore Corn and Flour Exchange—which is, as shown by the bill of exceptions, an *exclusive association* in which outsiders can do no business except through members—and evidence of these dealings between Irwin & Davis and Williar & Son was the only evidence given as tending to show knowledge on the part of Davis, or of the firm of Irwin & Davis, of this "Ring Settlement" custom, or of any custom of the Corn and Flour Exchange. There is no evidence that either Davis or Irwin was ever in Baltimore, or that they knew that Williar & Son were members of the board, or that they even knew that the Baltimore Corn and Flour Exchange had any existence. Yet, by this instruction, the firm of Irwin & Davis is held bound by this most pernicious custom. Authorities already cited in support of our propositions of law show that this is not the law. It was, therefore, error for the court to so instruct.

We object to the eighth instruction given by the court because it states particularly and makes prominent the evidence *favoring Williar & Son*, while it only partially and in a general way calls the attention of the jury to the evidence favoring Irwin, and entirely fails to mention or allude to many of the most important items of evidence supporting Irwin's defense.

1. It calls particular attention to the evidence of Henry D. Williar, in which he testified that Williar & Son intended and expected actual performance of the contracts, and actual shipment and delivery of the wheat.

2. It calls particular attention of the jury to "*the importance of Baltimore as a grain market.*"

These two items of evidence are made very prominent, and are pressed upon the attention of the jury. We aver with confidence that they are the only two items of evidence that can be found in the case tending to support the claim of Williar & Son, as against the defense of Irwin, that these were all gambling transactions to be ~~supported~~ upon payment of differences, no actual delivery being intended.

Settled

3. It fails to call the attention of the jury to any of the many prominent facts proved in favor of Irwin. It calls general attention to "previous dealings between Irwin & Davis and Williar & Son"; "the financial standing and ability of Irwin & Davis," and "the opportunity Williar & Son had had to know the extent and character of the business of Irwin & Davis," and that is all.

Why did the court call especial attention to "the importance of Baltimore as a grain market," and omit to call their attention to "*the unimportance of Brazil as a grain market?*" The one is surely as pertinent to the issue as the other. Why should the court press upon the attention of the jury the evidence given by Williar as his interpretation of these transactions, and wholly fail to call to the attention of the jury the proved fact that Davis stamped his interpretation of these transactions upon them by taking his own life? Why did the court utterly fail to call attention to the *locality*, capital, volume of business, facilities, surroundings and common repute of the firm of Irwin & Davis *at Brazil?*

Not a word is said to the jury about the immense amount of wheat ordered sold by Davis as compared with the small amount actually shipped by him to Williar & Son. Nothing is said about the fact that all the wheat actually shipped to Williar & Son, while these options were running, was sold by Williar & Son, and the money either sent to Irwin & Davis, or applied on *margins*. Nothing is said about the fact that, after the options had half expired, without any wheat being delivered on the contracts, Williar & Son are found begging Davis to *ship wheat without drafts to apply on margins*—not to apply on contracts.

The important fact that Williar & Son pretended to *sell to themselves* and buy back *from themselves* one-fourth part of the wheat named in the very first order of Davis is entirely ignored by the court, and this transaction is pronounced by the charge legal and valid. Why was no mention made of the sudden *change* in the manner of dealing between Williar & Son and Irwin & Davis; the use of a cipher book; and the sudden inquiry by Williar & Son into the pecuniary responsibility of Irwin & Davis? Why is nothing said about the fact that no charges for hauling, handling storing and insuring wheat appear in the account of Williar & Son? Why is all reference to the gambling terms constantly used in the correspondence—the talk about "corners," "a squeeze," "no legitimate trading," "longs," "shorts," "bulls," "covering deals," calls for "margins," and the like,—carefully avoided? All these facts, and many more that might be named, were in proof. They were important proofs as to the *intent* of the parties. Actions always overbalance words when they come in conflict. These were the actions of the parties interpreting their *intention.* The court mentions none of them in instructing the jury, but does mention and make prominent all the material facts proved in behalf of Williar & Son, calling especial attention to them. Was it fair to Irwin?

We submit that the eighth instruction is erroneous.

We object to the fifth, sixth, seventh and eighth instructions taken together—they being the only instructions given on the defense that these were wagering transactions—for the reasons above given in considering them separately, and further because, as a whole, they fail to give the jury any rule of law by which to be guided in attempting to determine from all the evidence what the real *intent* of the parties was, and because they give a partial and incomplete statement of the evidence, giving undue prominence to evidence favoring Williar & Son, and omitting all mention of importante vidence favoring Irwin, and because no proper rules are given to the jury by which to apply the evidence in the case to this issue, and because the consideration of the *face of the transactions*, as an item of evidence, is, in effect, withdrawn from the jury by the instructions, and because undue and improper prominence is given to presumptions of law that are more than rebutted by the face of the transactions, and because the court instructed the jury that "Ring Settlements," as described in the instructions, are valid and legal, and were binding upon Irwin & Davis.

We object to the entire charge, as a whole, as being erroneous for the various reasons and in the various particulars hereinbefore pointed out in discussing the several instructions given by the court on each of the two defenses set up by Irwin. We further object to the entire charge, for the reason that, as a whole, it does not give to the jury a fair, full and complete statement of the law applicable to the case, and by which the jury could apply the evidence to the issues; that it is calculated to mislead the jury to the prejudice of the rights of Irwin, and that in various particulars, heretofore mentioned, it is erroneous and contrary to law.

Authorities cited in connection with the various propositions of law herein submitted, most strongly support the views we have advanced and sought to support by argument. We would be glad to quote extensively from these cases. Many of them are of very great interest, and present most cogently the reasons why courts should examine most closely such transactions as these, and by their instructions give to the jury an opportunity to sift out and determine the *intent* of parties, although hidden under a form of words that might be used in furtherance of real transactions, undertaken in good faith; but time and space forbid further quotation. We have sought to condense the gist of the adjudged cases into a few propositions covering the questions involved in the case at bar.

Upon the defense of Irwin that these were wagering transactions, and therefore void, counsel for Irwin asked the court to give to the jury each of the following instructions:

"14 (*a*). The fact that the firm of Irwin & Davis shipped some 10,000 bushels of wheat and 11 car loads of corn to

Williar & Son, as commission merchants, from April, 1875, to October, 1877, with orders to them to sell the same on the market and remit proceeds of sales, does not raise or support any presumption that Irwin & Davis knew and understood the rules of an exclusive association of produce brokers and commission merchants of Baltimore, known as the Corn and Flour Exchange of Baltimore, nor do such shipments of actual produce for sale on arrival, or on order after arrival, at all charge them (I. & D.) with knowledge of such rules, or in any degree bind them by said rules and regulations of said Exchange as to settlements between members of said Exchange.

"15. It has been stated that one of the defenses in this case is that the transactions out of which the plaintiffs' claim grows were gambling transactions. If you believe from the evidence that such is the fact, your verdict must be for the defendant.

"16. It is insisted on behalf of plaintiffs that the transactions between themselves and the firm of Irwin & Davis were *bona fide* sales and purchases of actual property. It is insisted on behalf of the defendant that those transactions were betting, wagering, or gambling transactions, and as such void. This is a question of fact which you are to determine from all the evidence before you.

"If you believe from the evidence that plaintiffs sold grain in Baltimore for future delivery, professedly for the firm of Irwin & Davis, but not intending to receive the grain from Irwin & Davis, but intending to deliver it themselves, and actually delivering it and charging Irwin & Davis with any rise in price, and crediting Irwin & Davis with any fall in price; and if you further believe that it was the intention and understanding and agreement between plaintiffs and said Irwin & Davis that nothing more should be invested by said Irwin & Davis than an amount supposed to be sufficient to protect said plaintiffs from loss, I instruct you that such transactions were merely gambling contracts, and as such were void, and your verdict should be for defendant.

"17. If you believe from the evidence that in the transactions between plaintiffs and Irwin & Davis it was not the intention of said Irwin & Davis to actually deliver or receive any of the property purporting to be sold or bought by them, but merely to bet or gamble upon the rise or fall of the price of property, and if you also believe from the evidence that such intention was known to plaintiffs, your verdict should be for defendant.

"In determining what the intention of the parties was you should take into consideration the amount of property actually received or delivered by Irwin & Davis; whether they had the means to complete the trades they professed to make, to pay for what they professed to buy, and deliver what they professed to sell, and also the manner in which the accounts are made out between plaintiffs and said Irwin & Davis, and the general manner in which the business was conducted.

"18. In determining whether the transactions out of which plaintiffs' claim grows were *bona fide* or gambling transactions, you will consider all the evidence regarding the dealings between Irwin & Davis and plaintiffs.

"If you believe from the evidence that plaintiffs had, in the years 1875 and 1876, a number of dealings with the firm of Irwin & Davis, in amounts not as much as $1,000 in any one transaction, and amounting during those two years to about $, and if you also believe from the evidence that the transactions upon which the plaintiffs' claim is founded consist of different transactions, beginning with a sale amounting to over $26,000, and the least of which is $6,600, and the greatest over $50,000, all occurring during about two and a half months, and all for future delivery, and amounting to over $251,000, I leave it for you to say whether such sudden change in the nature of the dealings was not sufficient to put plaintiffs on their guard, and to charge them with knowledge that such transactions were intended as mere bets and wagers, and not *bona fide* transactions.

"19. If you believe from the evidence that the principal business of Irwin & Davis was in fact, and by general reputation, the running of flouring mills at Brazil, Indiana, buying wheat and corn, manufacturing it into flour and meal, and selling the product, and that as an incident to said principal business, they took all such wheat and corn as was offered at their mills, shipping for immediate sale what they did not need for use; and if you further believe that the transactions upon which plaintiffs' claim is based consist of alleged dealings beginning with an order for the sale of 20,000 bushels of wheat, amounting to over $26,000, the least of the orders amounting to $6,600, and the greatest over $50,000, all occuring during about two and a half months, and all for future delivery, and amounting to over $251,000 in all, I leave it for you to say whether such transactions were not of a nature to put plaintiffs on their guard, and to charge them with knowledge that such transactions were intended as mere bets and wagers. If they were, your verdict must be for defendant.

"19 (*a*.). If you believe from the evidence that in the latter part of July and in August, 1877, plaintiffs received orders to sell for Irwin & Davis 105,000 bushels of wheat, all to be delivered in the month of September, 1877, at Baltimore, the different orders varying in amount from 10,000 to 40,000 bushels each, I leave it to you to say whether that fact was not sufficient to put plaintiffs upon their guard, and to charge plaintiffs with knowledge that the transactions were gambling transactions on the part of those ordering the sales, taking into consideration the place where said firm was located and the nature and amounts of their previous transactions.

"20. The defendant, in addition to the defenses of which I have spoken, has in a counter-claim for the value of wheat actually shipped by Irwin & Davis to plaintiffs.

"If you find for the defendant upon the ground that the transactions were gambling transactions, he is entitled to recover against the plaintiffs any balance there may be due from plaintiffs to the firm of Irwin & Davis, upon the wheat actually shipped to plaintiffs by Irwin & Davis, if any such balance there be, with interest at 6 per cent. from about the 1st of November, 1877."

The court refused to give to the jury each of said instructions. We submit that this was error. The 16th, 17th, 18th, 19th and 19th (*a*) gave to the jury rules and directions by which to weigh and apply the evidence to the issue. They are certainly not, nor is either of them, covered by the charge given by the court. The law as cited in them is supported by good authority, and every fact alluded to in them is shown by the bill of exceptions to have been in evidence.

Instruction 14 (*a*), asked and refused, states in effect that the few small shipments made by Irwin & Davis to Williar & Son prior to the commencement of these speculative dealings—all of which were for sale on present delivery—did not raise or support the presumption that Irwin & Davis knew the customs of the exchange association known as the Baltimore Corn and Flour Exchange, regarding purchases and sales for future delivery, and "Ring Settlements." This is good sense and good law. According to all the authorities, the rules of that exclusive association can only bind those who contract with full knowledge of such rules, and make their contract subject to them.

The 15th instruction asked and refused states a proposition that is good law beyond question. It is quite remarkable that there is nothing in the charge of the court covering the ground covered by this instruction. The charge as given by the court does not even state to the jury that gambling transactions are void, nor does it anywhere tell the jury that their verdict should be for Irwin if they believed from the evidence that these were gambling transactions. We asked the court to so instruct the jury, and the instruction was refused.

In this connection it is proper to state that by the laws of both the States of Indiana and Maryland, gaming contracts, and all notes, bills, bonds, conveyances, contracts, mortgages or other securities made or given, when the whole or any part of the consideration therefor is for money or any other valuable thing won on the result of any wager, or for repaying money lent or advanced for the purpose of being wagered, are illegal and void.

Revised Statutes of Ind., 1881, sec. 4950 and 2076.
Davis v. *Leonard*, 69 Ind. 213.
Frazee v. *State*, 58 Ind. 8.
Maryland Code, Vol. 1, p. 220, sec. 61.
Gough v. *Pratt Adm'r Kent*, 9 Md. Reps. 526.

ADMISSION AND REJECTION OF EVIDENCE.

We submit that the court erred in admitting the evidence regarding customs of members of the Baltimore Corn and Flour Exchange for the reasons, and upon the authorities, hereinbefore given. This evidence could only have been legally admitted after Williar & Son had proved that Irwin & Davis had knowledge of these customs, and that these dealings were made subject to them. The court refused to admit in evidence the letter of Davis to Irwin on October 2, 1877. Rec. p. 39. We submit that it was admissible in evidence as a part of the *res gesta*. It was written before these transactions closed. The proof showed that Irwin was, and had been for years, absent from Brazil, and had no control or knowledge of the firm business. Hence this letter could not have been a concerted attempt to manufacture evidence.

When the case was tried Davis was dead. By division of the case into two suits, Williar & Son made themselves competent witnesses in this action against Irwin. Henry D. Williar testified as to the intention of Williar & Son in these transactions. Davis was the other actor in them. This letter proved his intention and understanding regarding these transactions, and the facts surrounding the transactions strongly support Davis' theory of them as manifested in this letter. Irwin ought to have had the benefit of this letter as evidence in his behalf.

DIVISION OF CASE AFTER TRANSFER TO THE UNITED STATES CIRCUIT COURT.

By the statute of Indiana, "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the life-time of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate."

Revised Statutes of Ind., 1881, sec. 498.

By the act of Congress of June, 1872, it is provided as follows:

"Sec. 914. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Rule 9 of the rules of the Circuit and District Courts of the United States for the District of Indiana, contains the following:

No. 9. "The Statutes of the State in relation to evidence oral and written, including the mode of its production and inspection, and the competency and credibility of witnesses, are adopted by this court."

It is the law and practice in Indiana to join the surviving partner and the administrator of the deceased partner in the same action, and that was done in this case while the action was pending in the State court. Rec. p. 9.

From these statutes and rules of practice it is evident that the case came properly into the United States Circuit Court with Compton, administrator of Davis, as a party defendant. It is also clear that if this administrator of Davis had remained a party to the action, Williar & Son could not have testified in their own behalf. Had the court the right to split the action into two different actions after the transfer, and thereby evade the law of the State regarding the competency of witnesses, and enable Williar & Son to testify in their own behalf against Irwin? We submit that this action of the court was error. It was at the time objected to by counsel for Irwin, and was called to the attention of the court in the motion for new trial. Rec., p. 25.

We know of no reason why the Federal Courts are not, and should not be, bound by the act of Congress above set out. If they are so bound, this action of the court was error. That it was prejudicial to the interests of Irwin is too plain for discussion.

We have now discussed the questions of law arising in this case. Some of these questions are, so far as we have been able to find from decided cases, new to this court. This arises perhaps from the fact that deep and reckless speculating and gambling under the form of legitimate transactions, are of comparatively recent growth in our country. The grain and stock gambling mania that is sapping the morals, and eating away the subsistence of our farmers and small traders throughout the United States, has mainly developed during, and since the close of, the war.

Decisions of State courts on cases similar to the one at bar are accumulating rapidly. The tendency of these decisions is to check and condemn all transactions tainted with gambling, however carefully they may be cloaked by contracts legal and unobjectionable in form. That the good of society demands that all the power that can legally and justly be wielded by the courts, may be exercised to check and subdue this growing vice is evident.

It is casting its blight over the whole land; it is bringing grief and tears and hunger to thousands of happy homes; it is shaking public confidence and undermining the foundations of legitimate trade; it is polluting official integrity and corrupting private honor; its direct effects are seen in embezzlements, defalcations, breaches of trust, blasted reputations, bankrupts, paupers, felons and suicides.

Confident that the facts in the case at bar, under proper instructions, would produce a verdict in favor of this plaintiff in error, and believing that this record discloses grave errors of law, we ask this court to reverse this judgment.

Respectfully submitted,

McDONALD, BUTLER & MASON,

Attorneys for John W. Irwin,

By John M. Butler.

SUPREME COURT OF THE UNITED STATES.

JOHN W. IRWIN,
Plaintiff in Error.
No. 56.
GEORGE P. WILLIAR, ET AL.,
Defendants in Error.

Brief for Defendants in Error.

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SUPREME COURT OF THE UNITED STATES.

JOHN W. IRWIN,
Plaintiff in Error,
vs.
GEORGE P. WILLIAR, ET AL.,
Defendants in Error.
No. 56.

The declaration states that plaintiffs, in 1877, were partners, under the firm name of Geo. P. Williar & Son, as flour and grain commission merchants, in the city of Baltimore, and that the defendant and one George M. Davis were partners up to the twenty-fourth day of October, 1877 (when Davis died), in the business, among other things, of buying and selling grain, at the city of Brazil, Indiana. That on the seventeenth of July, of that year, Irwin and Davis ordered plaintiffs, as such commission merchants to sell for them ten thousand bushels of No. 2 red winter wheat, at or above $1.42 per bushel, deliverable in all the month of September, 1877, at the seller's option. That it was and is a general usage of long standing and well known in all the great grain markets of the country, especially in Baltimore, that in contracting sales for the future delivery of grain for their customers, commission merchants do so in their own names, thus becoming personally liable for the performance of contracts.

That pursuant to this usage, Williar & Son complied with the order of Irwin & Davis, and contracted in their own names, with a responsible party, for the sale of the 10,000 bushels of wheat at the price limited, amounting in the aggregate to $14,200, deliverable as specified.

That the sale was promptly reported to Irwin & Davis and approved by them, and that they undertook to ship the grain to Williar & Son so as to enable them to perform their contract, and to pay reasonable commissions, etc. That Irwin & Davis failed to ship the wheat, but on the 17th of August ordered Williar & Son to close the transaction by purchasing a like amount of like wheat and delivering it on the contract. That on the next day Williar & Son, with their own money, purchased the wheat at an advance over the sale price of $50. That this deficit, together with $100, the reasonable commissions of Williar & Son, remains unpaid. (Printed Record, pp. 9 to 11.)

The foregoing is the substance, in brief, of the first count of the declaration.

The second and third counts set up several other like transactions between the parties, in which, however, the losses turned out to be greater. The fourth is the common count.

The pleas were: first, the general issue; second, that the several contracts and transactions sued upon were merely gambling transactions and illegal; third, that Irwin, the plaintiff in error, was a partner with Davis, deceased, only in the business of buying wheat and manufacturing it into flour, at Brazil, Indiana, and in selling the manufactured product, and that the dealings mentioned in the declaration were had by Davis alone, pretending to act for Irwin & Davis, but that they were without the knowledge of Irwin and were outside the scope of partnership.

The fourth plea was of set off, but it is not necessary to refer to it, or the reply to it. (P. R. 22, 23).

The verdict and judgment were for the plaintiffs below, in the sum of $17,622.78.

PARTNERSHIP.

It was contended on behalf of the plaintiff in error, in the Circuit Court, that the evidence was insufficient to show either that he was in fact a partner with Davis, deceased, as to those transactions, or that he was so held out as such, with his knowledge, as to charge him with the liabilities of partner.

Upon this question, the bill of exception shows that there was evidence tending to prove, among other things, that Irwin & Davis became owners, as partners, in 1872, of a flouring mill, in Brazil, Indiana (P. R., 28). That the partnership agreement, which was verbal, contemplated the buying of grain, to be manufactured into flour and meal, and the sale of any excess of grain that might accumulate, but did not contemplate "as "between themselves the buying and selling of grain in "large quantites for speculation." That Irwin resided at Butler, Pennsylvania, visiting Brazil but rarely, leaving the business entirely to Davis; that soon after the formation of the partnership Davis began shipping, in the firm name and as part of its business, grain to Indianapolis and Baltimore in limited quantities. That appurtenant to the mill was a warehouse for storage of grain, with appliances for the loading and unloading of grain into and from cars. That in the year 1875 divers consignments of corn were made to Williar & Son for sale on account of Irwin & Davis. That from the formation of the partnership Davis conducted its correspondence upon paper bearing the following printed card or letter-head:

"BRAZIL FLOURING MILLS.
"IRWIN & DAVIS,
"*Millers and Dealers in Grain,*
"*Brazil, Ind.*"

That this card or letter-head was employed in correspondence with Williar & Son about the consignments in 1875, and also in the correspondence relating to the matter in controversy in 1877, and that plaintiff in error knew that Davis was conducting the firm correspondence on paper bearing such card or letter-head. (P. R., p. 28). That consignments of wheat had been made in the name of Irwin & Davis to New York, Toledo and Indianapolis for sale, in 1877, and that during 1876 there had been large dealings in grain in Chicago, which were entered on the firm books, but there was evidence tending to show that Irwin was not actually informed of those dealings. That there was no evidence tending to prove that Davis had prior to 1877, ordered any *purchases* of grain in Eastern markets. There was also evidence tending to show that during the correspondence relating to those transactions, the parties had no personal acquaintance, that neither member of either firm ever saw either member of the other firm till Oct. 31st, 1877, after all the purchases were made. Also that Williar & Son had no knowledge of the fact that either member of the firm of Irwin & Davis resided elsewhere than at Brazil, Indiana, nor did they know which of them conducted the business and the correspondence. (P. R., p. 33.)

REJECTED INSTRUCTIONS.

The first *fourteen* of the instructions to the jury moved by the defendant and refused by the court, related to this question of partnership and as to whether the transactions out of which the suit arose, were within its scope. (P. R., pp. 39 to 41).

The *first* prayer is but a statement of the defences relied upon by defendant, and they are clearly stated in the general charge.

The *second* was to the effect that in order to make a *prima facie* case, plaintiffs should show that the sales of wheat were made upon the orders *of the firm of Irwin & Davis*, and also that those transactions were such as plaintiffs had a right to believe, *from what knowledge they had of the firm of Irwin & Davis*, were within the regular business of that firm.

If the orders were given by *the firm of Irwin & Davis*, it was quite immaterial whether they were within the regular business of the firm or not, and it would have been erroneous to require plaintiffs to prove this additional fact. But it would have been erroneous to require plaintiffs to prove that the orders emanated *from the firm*.

There was evidence tending to prove that the contract of partnership did not, as between the partners, contemplate large speculations in grain, but there was also evidence tending to prove that there had been a holding out of the firm as dealers in grain, with the knowledge and at least the tacit consent of Irwin, so as to estop him, as against persons dealing in good faith, to say that he was not a partner in such transactions. This instruction would have required proof of actual partnership. It would have taken the question of *holding out* from the jury, and would have been inconsistent with the charge of the court upon that point.

The *third* prayer would also have taken from the jury the question of estoppel of Irwin to deny the partnership. It also asserts the proposition that dealings with *the firm* outside the ordinary scope of its business, impose no liability upon it.

The *fourth*, *fifth* and *sixth* prayers are substantially to this effect: That the fact that Irwin & Davis had previously consigned to plaintiffs grain in smaller quantities for immediate sale, would not justify the plaintiffs in supposing that they had so increased the scope of their business as to make large sales for future delivery.

It is submitted that no rule of law raises a presumption, when the business of a firm is largely increased, that any partner is abusing his authority as partner. Here there was evidence going to show that the plaintiffs had inquired as to the financial responsibility of Irwin & Davis of a mercantile agency and of members of the corn and flour exchange, and from these sources understood that Davis was worth $20,000 or $25,000 and that Irwin was worth from $200,000 to $300,000. With grain dealers, having such backing, there was nothing in these orders to sell calculated to excite wonder or further inquiry. As to all the matters embraced in these three prayers the court said all that was proper to be said in its general charge. (P. R., p. 47.)

The *seventh* instruction asked and refused was in effect: That the fact that Irwin & Davis had shipped wheat for immediate sale would not, of itself, justify plaintiffs in believing that their business embraced the selling of wheat for future delivery.

This could not properly have been given to the jury as a proposition of law. If a firm of grain dealers, accustomed to ship grain to their commission merchant for immediate sale, should afterwards direct him to contract for the sale of grain in advance of actual shipment, to be delivered at a future time, he would have no right to suppose that the transaction was outside the scope of the firm's business.

The *eighth* prayer was as follows:

"The place at which the firm of Irwin & Davis was "located, the probabilities of their being able to get the "amount of wheat they had sold for future delivery; the "ability or lack of ability of the firm to handle the "amount of wheat ordered sold, the amount of dealings "in former years, and the amount of actual shipments as "compared with sales ordered, are proper matters for "you to consider in determining what the scope of the "business of Irwin & Davis was, and whether it embraced "such transactions as those out of which the alleged "balance mentioned in plaintiff's complaint grew."

This proposes five matters or subjects as proper to be considered in determining what the scope of the business of Irwin & Davis was. If any one of these was such as that the court should not have directed the jury to consider it in that connection, the prayer was properly refused. It is difficult to see any important advantage the jury could derive from a consideration of the location of the firm. As to the probabilities of their being able to get the amount of wheat they contracted to sell, there was no evidence to guide them. There was some evidence tending to show the amount of the wheat product of several counties surrounding Brazil. But there was no evidence tending to show that they depended on that region. They were speculating on wheat and might have filled their contracts by purchases at Indianapolis or elsewhere.

As to their ability or lack of ability to handle the amount of wheat contracted to be sold, the only evidence was their commercial rating above mentioned. There was no evidence whatever of any lack of ability.

As to the amount of dealings in former years, that has already been spoken of.

As to the amount of actual shipments compared with sales ordered, that fact did not transpire until after the sales were ordered, so that this circumstance was not proper for consideration in determining whether the scope of their business embraced the ordering of those sales.

If the court had been asked to say that the jury might consider these matters in determining whether or not the transactions were of a gaming nature, the request would have seemed more reasonable. But it is impossible to see how some of them, at least, could throw any light on the other question.

The *ninth* prayer was for an instruction that the burden of proving that the transactions were within the apparent scope of the partnership business, rested upon plaintiffs.

This instruction was of no practical importance as the case stood, and in the attitude of the evidence it would not have been proper to give it. The plaintiff had offered evidence tending to prove that the transactions in question were within the scope of the business that the defendant had, knowingly, suffered the firm to be held out as doing. The prayer ignored this. It should have been to the effect that the burden of proving either that the transactions were within the real scope of the business, or within the scope of it as advertised with the knowledge and acquiescence of Irwin, rested on the plaintiffs. This question was sufficiently covered by the first four charges of the court, which plainly proceed on the assumption that the burden was on plaintiffs. (P. R., pp. 44, 45).

The *tenth* instruction asked and refused was, that in determining the apparent scope of business of Irwin & Davis, the jury should consider plaintiffs' means of knowledge respecting it, including prior dealings, the amount and nature of prior dealings, the known location of the firm and the general reputation as to the character of the business of the firm of Irwin & Davis.

This was substantially embraced in some of the preceding prayers that have been considered.

The evidence did not show what means of knowledge the plaintiffs had as to the scope of the business of Irwin & Davis, or that they had any, except such as the transactions themselves between the two firms furnished. As to the "general reputation as to the character of the "business of the firm of Irwin & Davis," the bill of exceptions does not show that there was any evidence, much less that the plaintiffs, who lived in Baltimore, and never were at Brazil until after all the sales were made, knew what that general reputation was.

The *eleventh* instruction asked and refused was to the effect that if the principal business of Irwin & Davis was, in fact and by general reputation, the management of flouring-mills at Brazil, Indiana, buying and grinding grain and selling the manufactured product, and that as an incident to this principal business, they bought all such wheat and corn as was offered, and shipped, for immediate sale, what they did not need for use, plaintiffs would not be authorized to infer from such fact that the scope of the business of the firm embraced the selling and buying of wheat in large amounts in Baltimore for future delivery.

Such an instruction would have been merely hypothetical and not pertinent to the facts in evidence. There was no evidence tending to prove that the plaintiffs knew of the existence of any such state of facts, or that they drew from them the inference that the prayer assumes would have been unauthorized.

The *twelfth* prayer asserts no legal proposition or duty. It proceeds upon the hypothesis of small dealings between the parties in 1875 and 1876, each for less than $1,000, and that the transactions in question were large, the least one amounting to $6,600 and the largest to over $50,000, amounting in all to over $251,000, and then leaves it to the jury to say whether such sudden change in the nature of the dealings was not sufficient to put plaintiffs on their guard, and to charge them with knowledge that the transactions were outside the partnership business of Irwin & Davis, if such was the fact.

Counsel might themselves make such argument to the jury, but they could not expect the court to make it for them. But it is difficult to see how their deduction from the facts assumed can properly be drawn. The evidence showed that neither of the plaintiffs, who resided in Baltimore, was personally acquainted with Irwin or Davis while these transactions were being had; that neither had knowledge that either Irwin or Davis resided elsewhere than at Brazil, nor as to which of them conducted the business and correspondence. (P. R., p. 33).

If both Irwin and Davis knew of these transactions and consented to them, it can not be said, as against the plaintiffs, that the transactions were outside the scope of defendant's business. There was nothing to put plaintiffs upon notice that the orders to sell were not the act of both members of the firm of Irwin & Davis, and nothing whatever to put them upon notice that those orders were the act of one of them alone, in excess of his authority as partner.

The *thirteenth* prayer is to the effect that the law presumes that the business of a firm is to be transacted at the place where the firm is located, and that, such being the presumption law, it was the duty of plaintiffs to inform themselves whether any *purchases* of wheat ordered by Irwin & Davis were within the scope of their partnership, and that plaintiffs were chargeable with notice, &c.

It is submitted that the law creates no fixed presumption on the subject. In the case of a partnership to retail dry goods, there is a presumption of fact that the goods will be sold at the *situs* of the partnership, and that they will be bought wherever it can be done most advantageously. In this case the presumption of fact would be, that Irwin & Davis would manufacture their flour and corn meal at Brazil, because their mill was there, but that in dealing in grain, they would buy wherever they could buy lowest, and sell wherever they could sell highest. But if the presumption of law assumed existed, no connection is apparent between it and the consequence claimed to flow from it. Surely the counsel for plaintiff in error do not claim that a partner, or a partnership, outside the particular locality, like a corporation that has migrated into another sovereignty, is powerless to act.

But even if this 13th prayer contained a sound abstract proposition of law, it is irrelevant to the case. The question was as to the authority of Davis, as partner, to order *sales* of wheat for Irwin & Davis. This prayer relates to his authority as partner to order *purchases* of wheat for his firm.

The *fourteenth* prayer is to the effect that if the jury should find that in July, 1877, and before the occurrence of the losses, Irwin & Davis ordered plaintiffs to *buy* for them 10,000 bushels of wheat in Baltimore, and if they should also find that such purchase was not within the scope of the partnership business of Irwin & Davis, as agreed between themselves, the fact that such purchase was made at so great a distance from Brazil, and was not in fact within the scope of the partnership business, would be sufficient to put plaintiffs on notice that the partner so ordering was attempting to deal outside the scope of the partnership, and that transactions thereafter had with him would be at plaintiffs' peril.

This prayer seems to have proceeded on a mistake. There was no order given to or executed by plaintiffs to *buy* 10,000 bushels of wheat for Irwin & Davis in the month of July, 1877, or at any other time, except the orders given in August and subsequently to buy for the purpose of covering sales previously made.

In view of the facts that the bill of exceptions shows there was evidence tending to prove, the general charge of the court was very complete and clear (P. R., pp. 44, 45). The jury were told that if they believed "that the "purchase and sale of grain was within the apparent "scope of the partnership business, and that parties dealt "with Irwin & Davis *in good faith, believing that they were* "*dealing with the firm*, then the firm became liable for "such transactions."

The court further charged that if Irwin permitted Davis to hold himself and Irwin out to the world as partners in the business of dealing in grain, he became liable with Davis on contracts for the sale and purchase of grain for future delivery. That if he knew that Davis was holding the firm out as dealers in grain, and did not protest or give public notice to the contrary, he was responsible as partner for all contracts made by Davis in the firm name within the apparent scope of the business of dealing in grain.

That if Davis, in his correspondence with customers and others, including the plaintiffs, employed printed letter-heads or cards representing the firm of Irwin & Davis as grain dealers, this was a holding out of that firm as a partnership engaged in that business, and if before and at the time of the dealings with the plaintiffs, Irwin knew that the firm was thus held out as grain dealers, he was liable as a partner. The instruction as to this point concluded thus: "If, therefore, you believe, "from the evidence, that Irwin & Davis held themselves "out as dealers in grain as well as in flour, and that "plaintiffs dealt with Davis, *supposing they were dealing "with the firm*, and in so doing advanced their own "money in fulfilling such contracts, you should find for "the plaintiffs in whatever sum the evidence may show "them to be entitled to on account of such advances, "unless," etc.

Of those fourteen instructions moved by defendant, it may justly be said, as was said by this court in Continental Improvement Co. *v.* Stead, 95 U. S., 165–6:

"Perhaps some of the abstract propositions of the "defendant's counsel contained in the instructions asked "for, based on the facts assumed therein, if such facts "were conceded, or found in a special verdict, would be "technically correct. But a judge is not bound to charge "upon assumed facts in the *ipsissima verba* of counsel, nor "to give categorical answers to a judicial catechism "based on such assumption. Such a course would often "mislead the jury instead of enlightening them, and is "calculated rather to involve the case in the meshes of "technicality than to promote the ends of law and justice. It belongs to the judicial office to exercise discre"tion as to the style and form in which to expound the "law and comment upon the facts. If a judge states the "law incorrectly, or refuses to state it at all, on a point "material to the issue, the party aggrieved will be entitled "to a new trial. But when he explains the whole law "applicable to the case in hand, as we think was done "in this case, he can not be called upon to express it in "the categorical form, based upon assumed facts, which "counsel choose to present to him. See Mills *v.* Smith, "8 Wall. 27; Nudd *v.* Burrows, 91 U. S., 426."

GAMBLING.

As to the remaining instructions moved by defendant: That numbered 14 (*a*) assumes that Irwin & Davis were not chargeable with knowledge of the rules of the Corn and Flour Exchange of Baltimore, and the general custom of Baltimore commission merchants in making sales of grain for customers. As to these customs, it can hardly be doubted that when a country dealer orders a commission merchant to make a sale for him, he authorizes him to do so according to the established usages of trade at the place, and is, therefore, chargeable with the knowledge of such usages.

Story on Agency, sec. 60;
Graves *v.* Legg, 2 Hurl. & Nor., 210;
Sutton *v.* Tatham, 10 A. & E., 27;
Upton *v.* Suffolk Co. Mills, 11 Cush., 589.

The 15th, 16th and 17th (P. R., p. 42) instructions are to the effect that if the contracts of sale were mere gambling transactions, there could be no recovery. But the defendant had the benefit of this proposition in the general charge of the court, in which it was clearly and strongly stated in the court's fifth instruction (P. R., pp. 45, 46). Also the latter part of the seventh instruction. (P. R., p. 47).

The instructions numbered 18, 19 and 19 (*a*), asked and refused, are mere arguments that would have been out of place in a judicial charge to the jury. Neither of them asserts any legal proposition. (P. R., p. 43).

The remaining two instructions refused (P. R., p. 44) relate to defendant's right to recover the price of grain consigned to plaintiffs by Irwin & Davis, in case the jury should find that the contracts for sale of wheat were wagering contracts. But as the jury did not so find, these charges would have done the defendant no good if they had been given.

SPLITTING THE SUIT.

This suit was originally commenced in a State Court, the Clay Circuit Court, against the plaintiff in error, and Compton, the administrator of his deceased partner, Davis. The State code practice authorized such joinder.

Braxton *v.* State *ex. rel.*, 25th Ind., 82.

As against Irwin it was an action at law, while as against the administrator it was a suit in equity.

Nelson *v.* Hill, 5 How., on p. 133;
Lewis *v.* United States, 92 U. S., 622–3.

When the cause was removed into the Federal Court it was divided, and a bill in equity was filed against the administrator on the chancery side of the court, and a declaration against Irwin on the law side. (P. R.,

p. 9.) It is submitted that this was correct practice, since the court, as a court of law, could not take cognizance of the case as against the administrator, nor as a court of equity, as against Irwin. But whether this be so or not, an objection made here for the first time comes too late. The plaintiff in error, in his motion for a new trial (P. R. p. 25), assigns as his first cause this division of the case, saying that he had excepted to the order of the court allowing it at the time. This statement, however, is not sustained by the record, and is erroneous in fact. If true, it would furnish no reason for a new trial.

DEFENDANT'S REJECTED TESTIMONY.

The only testimony offered by defendant and rejected by the court, referred to in the bill of exceptions, was a letter written to him by his partner, Davis, under date of October 2d, 1877. (P. R., p. 39).

In this letter Davis informs Irwin that he had been taken in by a lot of grain gamblers. That although a Mr. Compton thought Irwin not liable for what Davis had done outside of milling, still advising Irwin not to come to Brazil, as they would get service on him and give him trouble.

No special fact appears in the record giving to this letter, written by one partner to the other, after the transactions had been closed out, any greater claim to admissibility than is indicated on its face.

In defendant's motion for a new trial, many reasons are assigned, based on the admission or rejection of testimony, but the bill of exceptions does not show what such testimony was.

BOTH PARTIES MUST HAVE INTENDED GAMING.

The court, in its sixth instruction (P. R., p. 46), charged the jury, in effect, that an intention on the part of Irwin & Davis not to deliver the wheat, was not, alone, sufficient to taint the contract with illegality as against the plaintiff; that to have that effect the plaintiff must have known, or had reason to believe, that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly.

It will be insisted there that this instruction was erroneous, and that an intent on the part of Irwin & Davis not to deliver, wholly vitiated the contract, whether that intent was known at the time to plaintiff or not.

But the recent decision of this court in Roundtree *v.* Smith (Sup. Court Reporter, vol. 2, part 8, p. 630), sustains the charge of the Circuit Court on this point.

The same view of the law has been taken in a number of State Court decisions, among others the following:

Gregory *v.* Wendell, 40 Mich., *infra*, on pp. 438, 439;
Pixley *v.* Boynton, 79 Ill., 351;
Sawyer *v.* Taggart, 14 Bush, 730.

This brief has necessarily been prepared without our having had the benefit of seeing the brief on the other side, consequently some points may be here anticipated that may not be made in this court, while others may be made that are not here anticipated.

SUBSTITUTION OF CONTRACTS.

The question that is deemed the most important one in this case is this: Must a commission merchant, who has contracted with another commission merchant to sell grain for future delivery, each acting for an undisclosed principal, keep on hand for the benefit of his principal, without being directed so to do, the identical contract made with the other commission merchant; or may the two commission merchants, where they have had another like transaction for other undisclosed principals, touching the same kind of grain for the same future delivery, but where their respective positions as buyer and seller are reversed, settle and cancel the contracts as between themselves, the first commission merchant thereafter holding the order of his second undisclosed principal to buy for him, in substitution for the contract of the second commission merchant to buy, the first commission merchant standing liable as guarantor to his first customer?

And may this principle be extended, so that, where there has been such a series or circuit of like contracts as that the first commission merchant seller becomes the last commission merchant buyer, a settlement, known as a "ring settlement," may be made among them?

This question presents itself in the record, both in the evidence admitted as to the usage of Baltimore merchants (P. R., pp. 34, 35), and in the charge of the court. (P. R., pp. 46, 47).

The seventh instruction given by the court to the jury is as follows:

"The testimony tends to show that a general custom "obtained among grain commission merchants in Balti- "more to the following effect: When one commission "merchant, upon the order of a customer, sells to another "commission merchant a quantity of grain for future "delivery, and where it occurs that at some other time "before the maturity of the contract, the same commission "merchant receives an order from another customer to "purchase the same or a larger quantity of the same kind "of grain for the same future delivery, and he executes this "second order by making the purchase from the same "commission merchant to whom he had made the sale in "the other case, that then, in such case, the two commis-"sion merchants meet together and exchange or cancel "the contracts as between themselves, adjusting the differ-"ence in the prices between the two contracts, and restor-"ing any margins that may have been put up, and that "from that time forth the first commission merchant "holds for the benefit of the customer for whom he sold "the order or contract of the purchaser for whom he "bought, so that the wheat of the selling customer may, "when delivered, be turned in on the order or contract of "the purchasing customer, and that the commission mer-"chant is held responsible as guarantor to his customer.

"The evidence further tends to show a custom obtain-"ing among commission merchants at Baltimore to the "further effect that though the second transaction may "have been had with a different commission merchant "from the one with which the first transaction was had, "yet where it can be found that a series of contracts are "in existence for the sale of like grain, for like delivery, "so that the seller owes the wheat to the buyer to whom "he sold, and he to another who owes like wheat for like "delivery to the first commission merchant, that then in "such case they settle by what they call "a ring," that is, "they all reciprocally surrender or cancel their contracts, "adjust the price differences between themselves, and sur-"render all margins that had been put up; that in all such "cases the commission merchant substitutes the contract "of another customer in place of that with the commis-"sion merchant whose contract has been cancelled or sur-"rendered, and that he guarantees to his customer the "performance of the contract originally made on his "behalf.

"I say to you, gentlemen, that these customs are "founded in commercial convenience; that they are not "in contravention of the law, and that they are valid."

The rule thus laid down has been considered and recognized in a number of State Court decisions, but it does not appear to have been as yet considered in this court.

Doubtless it is the general rule that when an agent buys property, or makes a contract for his principal, the principal becomes entitled to that specific property, or that specific contract. Ordinarily it is the duty of a bailee, with whom property has been deposited, to return the specific property to the bailor at the end of the bailment.

But commercial usage has introduced exceptions, which the law has sanctioned. For example: one depositing grain in an elevator can call only for the same quantity of like grain, not the identical grain deposited.

The course of business referred to in the charge quoted, has been long and extensively observed in commercial practice, and is essential to the convenience of merchants in the large grain centers.

In Gregory *v.* Wendell, 40 Mich., 432, these facts appeared: Gregory & McHardy, traders in the interior of Michigan, employed Wendell & Co., brokers in Detroit, to purchase for them 30,000 bushels of corn on the Chicago market for future delivery. Wendell & Co. made the purchase through two brokers in Chicago. The price of corn declined continuously from the date of the contract. Before the time for delivery arrived, Wendell & Co. wrote to Gregory & McHardy demanding further "margin," but received no answer. A few days after writing the letter, and still before expiration of time for delivery, and without orders from Gregory & McHardy, they sold the contract for the purchase of the corn at a large loss. When Gregory & McHardy were advised of the sale, they caused their attorney to advise Wendell & Co., by letter, that, inasmuch as they had sold the corn, thus rendering it impossible for them to fulfill the contract on their part, they, G. & McH., would treat it as at an end, and hold Wendell & Co. responsible for the amount paid them. On same day Wendell & Co. wrote to Gregory & McHardy, saying that, as the latter had failed to notify them of their approval of the sale, they, W. & Co., would hold themselves ready to deliver the corn according to the terms of the contract.

At the same time they made the necessary purchase of corn for that purpose, and at the proper time tendered warehouse receipt for the corn. The tender was refused, whereupon they sold the corn at a loss of over $2,000, measured by the original purchase, and sued Gregory & McHardy for the amount of the loss.

These facts led the court, Judge Cooley delivering its opinion, into a somewhat elaborate consideration of the relations between a grain broker and his customer. It is held that where a transaction is had in the usual course of such business, the customer, unless he specially requires it, acquires no interest in the contract made by the broker for him; that it is to be regarded as a contract between the customer and the broker, and that it is sufficient, if the broker prepares himself to perform it. It is said (pp. 440-1): "There is no doubt Wendell & Co. "were agents. They were to buy *for* defendants, and "they were to receive a commission for buying. As "agents they made purchases through Cooley & "McHenry, which were entered on the books of the lat-

"ter firm, and also through Erskine. But this is not a "complete statement of the case. If defendants must "have contracts with those who were the actual sellers, "it is necessary to look further; for Cooley & McHenry "and Erskine were only the correspondents of Wendell "& Co., and bought for them of third parties. There "were thus two intermediate parties between the ven-"dors and the vendees, and the ultimate parties were "probably wholly unknown to each other. The trans-"actions were entered on the books of the intermediate "parties, and as the evidence showed, they accounted to "each other as debtor and creditor in respect to them. "There is in all the evidence no intimation that the sell-"ers looked for any purpose beyond the brokers who "bought of them, namely, Cooley & McHenry, and "Erskine, or that defendants looked or expected to look "beyond their immediate brokers, Wendell & Co. The "intimation that Wendell & Co. were agents exclusively, "and had not fully performed their duty as such until "they had presented actual contracts with actual sellers, "is evidently not in accord with the understanding of "the parties."

Again on pp. 442–3, it is said:

"The implied understanding in all cases where the "purchase and sale is entrusted to the broker is, that the "purchaser looks to his broker, the broker looks to his "correspondent, and the latter looks to the party who "sells to him. If one desires to purchase grain for future "delivery, his broker orders the purchase, but the trans-"action is represented on the books of dealers, and not "by written contracts. The purchase now, when the "grain is to be delivered in the future, is not for the pur-"pose of having the quantity set apart to await the time, "but it is to fix the price which the purchaser is to account "for when the transaction is closed. It is never expected "that during all the time intermediate the day of purchase and the day of delivery an amount of grain corresponding to the amount bargained for, will lie in the "warehouse awaiting the maturity of the contract; but "the transaction, though called a purchase, is rather an "agreement for future delivery, which the broker is to see "is settled when the time arrives, unless it shall previously be disposed of under the orders of his principal. "The cases in which the vendors and vendees elect to "relieve the transaction of intermediate parties, and "look to each other exclusively, must be altogether "exceptional."

In Bailey *v.* Bensley (87 Ill., 556), the Supreme Court of Illinois considered the validity of a custom obtaining in the Chicago Board of Trade, whereby a grain commission merchant, receiving consignments of grain, and storing the same in public warehouse and taking receipts therefor, are not required to hold the particular receipts taken for the grain of the respective customers shipping it, for the benefit of such respective customers, until the time when they are directed to sell the grain, but may sell those particular receipts at any time after they are taken, and that it is sufficient if the commission merchant keeps continuously on hand, for the benefit of the customer, other warehouse receipts for a like amount of like grain, and, although the receipts for grain consigned by a particular customer may have been sold long before the time at which that customer ordered his grain sold, still, if the commission merchant has kept on hand other receipts for grain equal in grade and quantity, to the amount so consigned by a particular customer, the customer is liable for warehouse charges up to the time sale is made on his account. This custom was held valid and binding upon all persons consigning grain for sale in that market.

The same principle was laid down by Chancellor Kent more than fifty years ago in Nourse *v.* Prime (4 John Ch., 490), S. C., (7 John Ch., 85). It was followed in Horton *v.* Morgan (19 N. Y., 170). Also in Stewart *v.* Drake (46 N. Y., 450).

Worthington *v.* Torney (34 Md., 182), holds that stock bought by brokers on order need not be kept separate. It is sufficient if the broker had it either in his own possession or that of his agent.

Price *v.* Brown (40 Md., 102), holds as stated in one of the head notes: "Where a broker agrees to carry for "and on account of a customer, for the period of twelve "months, a certain number of shares of railroad stock, at "a specified price per share, he is not bound to retain in "his possession during the pending of the carrying con-"tract, the identical stock which he agreed to carry; he "may sell the whole or any part thereof; all that the law "requires of him is, that during the pendency of the con-"tract he should have on hand, in his possession, or under "his control, an equal number of other shares of the same "stock, ready for delivery when his customer should pay "what he owed on account thereof, or to be sold on his "account when he should so direct."

Of all the reported cases in which this question is considered, the one most directly in point is Oldershaw *v.* Knowls, 4 Bradwell (Appellate Court, Ill., first District), 63.

In that case as in this, the purchasing and selling brokers had settled their contracts between themselves, and had substituted the orders of subsequent customers.

It is true that the court was not one of last resort, but its opinion is so clear and strong that it would be entitled to high consideration as a mere argument, even if without any judicial sanction. The judgment that it reviewed was reversed and the case sent back for re-trial. The Trial Court disregarded the opinion of the Appellate Court, and the second trial had the same result as the first. The case came a second time before the Appellate Court (6 Brad., 325), and after a full re-argument it adhered to and re-asserted its former opinion and adjudged another reversal.

It would seem that on the next and last trial, the case went against the commission merchants on a question of fact, having no connection with the Board of Trade customs, that had influenced the former trials.

When the case at last came before the Supreme Court of that State (101 Ill., 117), the question under consideration was not in it.

It is respectfully submitted that there is no material error in this record, and that the judgment of the Circuit Court should be affirmed.

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